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On the Learning of

CONTINGENT REMAINDERS
AND
EXECUTORY DEVISES.

In this TREATISE the Doctrine of the Judgment delivered by the Court of King's Bench in the Case of PERRIN *versus* BLAKE, (since reversed in the Exchequer Chamber, which Reversal is now before the House of Lords) and the principal Authorities for and against it are fairly considered.

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in ENGLAND.

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Y A S S E

To receive 1 share

CONTINGENT REMAINERS

С. И. А.

EXECUTORY DIVISION

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Of the Inner Temple, Counsel at Law,

Author of the Legislative Code of the Republic of Ireland.

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To the READER.

OF all the intricate learning which respects the *English* laws of property, the doctrine of Contingent Estates is indisputably the most abstruse, though not least useful. This the experience of every gentleman conversant in the business of conveyancing can sufficiently testify. No treatise, however, has yet appeared written professedly on this subject. All that is to be met with concerning it, in the abridgments, or occasionally in other books of our law, is either confined as to scope, or thrown together without regard to any regular chain of connection. It was upon these grounds the Author of the present Essay flattered himself there might be some little merit, in disposing the most material points of learning on this subject into one connected view. This he has attempted in the following sheets, wherein he has endeavoured to

A

consider

consider and explain whatever is most material in the doctrine of Contingent Remainders and Executory Devises: how far he has succeeded remains with his readers to decide; one thing he is confident will not escape them, which is, that the following sheets contain some points essential to the clear understanding of the doctrine treated of, not to be found in any other Treatise, or any Abridgment or System of our Laws yet extant.

Inner Temple Lane,

June, 1772.

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The READER is requested to make the following Corrections.

Page 3. l. 14. for *cotigent* read *contingent*.

— 15. l. 30. strike out *and*.

— 26. l. 16. for the *semicolon* substitute a *comma*.

— *ibid* l. 18. for the *comma* substitute a *semicolon*.

— 30. l. 23. strike out *have*.

— 31. l. 23. for *tited* read *cited*.

— 34. l. 16. for *premoogenito* read *primogenito*.

— 45. l. 26. for *rever* read *never*.

— 49. l. 33. strike out *yet*.

— 64. l. 18. refer to *Palm*. 132.

— 73. l. 10. for *réver* read *revert*.

— 76. l. 7. for *daughters* read *daughter*.

— 80. l. 18. refer to *P. W.* 132. *Web. v. Web.*

— 90. l. 9. for *devisee* read *devisor*.

INTRO-

INTRODUCTION.

WHEN we consider estates with regard to the certainty and the time of the enjoyment of them, we may distinguish them into

Estates	vested	{ in Possession, in Interest,
	contingent, as	{ Contingent remainders and future uses, Executory devises, Estates to be enlarged on condition, Other uncertain interests reducible to no general head.

An estate *vested* is where there is an immediate fixed right of present or future enjoyment.

An estate *vested in possession* is where there exists a right of present enjoyment.

An estate *vested in interest* is where there is a present fixed right of future enjoyment.

B

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A *contingent estate* is where a right is to accrue upon an event which is dubious and uncertain.

The most considerable of the estates which fall under the last description are *contingent remainders*, and *executory devises*, the proposed subject of the ensuing sheets.

A CONTINGENT REMAINDER defined, and its several Kinds distinguished, &c.

A Contingent Remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate, for if it does not happen till after such determination, it will never take effect, as will appear when I come to treat of the time when a contingent remainder is to vest.

Under this definition we may properly distinguish four sorts of contingent remainders.—*First*, Where the determination of the preceding estate is itself dubious and contingent.—*Secondly*, Where the condition on which the remainder is to take effect, is independent of the determination of the preceding estate.—*Thirdly*, Where the condition upon which the remainder is limited is certain in event, but the determination of the particular estate may happen before it.—*Fourthly*, Where the person to whom the remainder is limited is not yet ascertained or not yet in being.

3 Rep. 20.

First, Where the determination of the preceding estate itself depends on an event which may never happen; as if *A.* make a feoffment to the use of *B.* till *C.* returns from *Rome*, and after such return of *C.* then to remain over in fee, here the particular estate is limited to determine on the return of *C.* an event which possibly may never happen, and therefore the remainder which depends on such contingent determination of the preceding estate is dubious and contingent.—

Poph. 97. Ar-
ton v. Hare.

So where a fine was levied to the use of *A.* and the heirs male of his body until he or the heirs male of his body had done such a thing, and after such a thing done, to the use of *B.* in tail, *A.* died without issue, and without performing the condition, and it was adjudged the remainder was contingent, and never took place.

3 Rep. 20.

Secondly, Where some uncertain event unconnected with and collateral to the determination of the preceding estate is, by the nature of the limitation, to precede the remainder; as if a lease be made to *A.* for life, remainder to *B.* for life, and if *B.* die before *A.* remainder to *C.* for life, here the event of *B.*'s dying before *A.* must precede and give effect to *C.*'s remainder; but that event is dubious, it may or may not happen, and the remainder depending on it is therefore contingent.— So if lands be given to *A.* in tail, and if *B.* come to *Westminster* hall such a day to *B.* in fee, this is a contingent remainder to *B.*

4 Leon. 236.

3 Rep. 20.

Thirdly, Where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or another, yet may not happen till after the determination of the particular estate; as if a lease be made to *J. S.* for life, and after the death of *J. D.* to remain to another

another in fee; now it is certain that *J. D.* must die some time or another, but his death may not happen till after the determination of the particular estate by the death of *J. S.* and therefore such remainder is contingent.—So in case of a lease for life to *A.* and after the death of *A.* and *M.* the remainder to *B.* in fee, this is a contingent remainder; for the particular estate being only for the life of *A.* and the remainder not to commence till after the death of *A.* and *M.* if *A.* die before *M.* the particular estate will end before the remainder can commence, which is very possible, and therefore such remainder is contingent.—So if a feoffment were to the use of *A.* ^{3 Rep. 20.} for 21 years, if he should so long live, and after his death to the use of *B.* in fee, here *A.* might survive the 21 years; if he should, the particular estate would determine before the remainder could commence, and therefore such remainder would be contingent, and would be void, for reasons which will appear hereafter.

Pollexf. 57. in
the case of
Weale and
Lower.

Fourthly, Where a remainder is limited to a person not ascertained or not in being at the time when such limitation is made, as if a lease be made to one for life, remainder to the right heirs of *J. S.* now there can be no such person as the right heir of *J. S.* until the death of *J. S.* ^{3 Rep. 20.} ^{Co. Lit. 378.} for *nemo est hæres viventis*, which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent.—So where a remainder is limited to the first son of *B.* who has no son then born, here *B.* may never have a son, or if he should the particular estate may determine before he has one, therefore such remainder is contingent.—So an estate to two for life remainder to the survivor of them in fee is a con-

1 Ventr. 306.

Cro. Car. 102.

tingent estate, for it is uncertain who will be the survivor.

Every species of contingent remainders may, I apprehend, be reduced to one or other of the foregoing descriptions; but although every one of those descriptions is necessary in order to comprise in our general distribution every known instance of a contingent remainder, yet we must remember, that several cases which fall literally under one or other of the two last descriptions are nevertheless ranked among vested estates.

To begin with those cases which are exceptions to the third of the foregoing descriptions, I must observe, that where there is a particular estate limited for a long term of years, as 80 or upwards, determinable on the life of a person then in being, with remainder over on the death of that person, as a lease to *A.* for 80 years, if *B.* so long live, remainder after the death of *B.* to *C.* in fee, it has been held, that notwithstanding the remainder is in this case limited to take effect on an event, (*viz.* the death of *B.*) which possibly may not happen till after the expiration of the preceding estate for 80 years, yet as the chance against such event's happening before the expiration of the particular estate is exceedingly small, such remainder shall be considered as vested, and that the mere possibility that a life in being may endure 80 years to come, does not amount to a degree of uncertainty sufficient to constitute a contingent remainder.

Pollexf. 67.

Lit. Rep. 370.

As if a feoffment be to the use of *A.* for 99 years if he shall so long live, and after his death to the use of *B.* in fee, this shall not be contingent, but it shall be presumed his life will not exceed 99 years; but it had been otherwise if it had

been made but for 21 years.—So in the case of *Hatt. 119.*
Napper and Saunders, reported by *Hutton*, which,
 as to the point in question, was no more
 than this, feoffment was to the use of trustees
 for 80 years if *A.* so long live, remainder to *B.*
 in tail, and it was adjudged that this remainder
 to *B.* in tail was a vested remainder; and a similar
 case is there cited by the court as Lord *Derby's*
 case, which is there said to have been adjudged
 a vested remainder, after many arguments there-
 upon at *Serjeants Inn.*—But in a case of the same
 kind in Chancery, where the particular estate was
 only for 60 years, determinable on a life, the
 Lords Commissioners were of opinion, the re-
 mainder could not be considered as vested.

² Vern. 131.
Beverly v.
Beverly.

We come next to those cases which are to be
 excepted from the literal extent of the last of the
 foregoing descriptions; these will be found to be
 much more numerous as they depend on one
 hand on a general rule of law respecting limita-
 tions to the heirs general or special, where the
 ancestor takes an estate of freehold in the same
 conveyance, and on the other, upon the respect
 which is paid to the intent of a testator where it
 can be collected from any particular expressions
 in his will.

Upon the first of these grounds we are to ob-
 serve, that wherever the ancestor takes an estate
 of freehold or frank tenement, and an immediate
 remainder is thereon limited in the same convey-
 ance to his heirs or heirs in tail, such remainder
 is immediately executed in the ancestor so taking
 the freehold, and therefore is not contingent or
 in abeyance, as an estate for life to *A.* remainder
 to the heirs of his body; this is not a contingent
 remainder to the heir of the body of *A.* but an
 estate tail executed in *A.* So likewise wherever

² Roll. Abrid.
^{417.}
¹ Rep. 104.

¹ Inst. 22. b.

2 Roll. Abr. 417. the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards in the same gift or conveyance a limitation to his right heirs or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, this remainder to his heirs vests in the ancestor as a remainder, and shall not be in contingency or abeyance.

Brook Done, 6 c. pl. 11. As a lease for life with divers remainders over, remainder to the right heirs of first lessee for life, this is a remainder in fee vested in the first lessee for life; and after his death, and the determination of the mean remainders, his heir shall be in as heir, and not as purchaser. So where land is given to *A.* for life, remainder to *B.* for life, remainder to the heirs male of the body of *A.* who has two sons, the eldest has issue a daughter, and dies, *A.* and *B.* die, the youngest son shall have the land as heir male; which proves the remainder in tail vested in the father.

Roll indeed takes a distinction by saying, that where the frank tenement is so limited to the ancestor, that all the mediate estates between that and the limitation to his heirs, as well as his own estate, may determine during his life, in that case the limitation to his heirs is a contingent remainder; as if a feoffment be made to the use of *A.* and *B.* during their joint lives, and, after the death of either of them, to the use of *C.* for life, remainder to the heirs of the body of *B.* this remainder he says does not attach in *B.* but is in abeyance; because if *A.* and *C.* die in the lifetime of *B.* the estate to *B.* is determined, and the remainder to *C.* ended, and yet the remainder to the heirs of *B.* cannot take effect, because he cannot have an heir during his life.

But

But this distinction, for which *Roll* cites no authority at all, is opposed by two authorities, which are expressly to the contrary: The first is in *Perkins*; if lands be leased unto *A.* and *B.* *Perk.* f. 337. for the life of *C.* the remainder unto the right heirs of *A.* and *A.* take a wife, and *C.* dieth, leaving *A.* and *B.* and *A.* dieth, leaving *B.* the wife of *A.* shall be endowed; because that *cestui que vie* dieth, living *A.* the husband, so as the freehold and inheritance are joined in the husband during the coverture. Here we see the freehold was so limited to *A.* that it very probably might, (and as the case is put, did) determine before the death of *A.* but notwithstanding he could have no heir at the time of such determination, yet the freehold and inheritance were united in him at the death of *C.* consequently the remainder to his right heirs was completely executed in himself by the death of *C.* and therefore that limitation must have been a vested remainder in its creation; for had it been a contingent estate to the heir of *A.* the inheritance could never have been executed or vested in *A.* Consonant to this is the other case, which is in *1 Keb. 888.* *Keble*: an estate was limited to husband and wife during their joint lives; and after the decease of either of them, remainder to the heirs of the wife begotten by the husband, remainder to the wife for life. Upon a dispute between the children and the wife, after the death of the husband, whether this was an estate tail in the wife or a contingent remainder, *Keeling* conceived it an estate tail, executed *sub modo*, not presently by severance of the jointure, as it would be by a several conveyance, but upon the death of him whose life kept the estates asunder, they were united and executed; and the court agreed there-

1 Keb. 888.

Merrel and Rumsey.

Raym. 127.

was no contingency either in estate or person, and that an estate to a woman *durante viduitate*, remainder to the heirs of her body, is an estate tail in the woman. Upon the authority of these two last cases, I apprehend, that the possibility of the freehold determining in the life of the ancestor who takes it, does not keep the subsequent limitation to his heirs from vesting in himself; and therefore, I think, we may venture to lay it down as a general rule, that whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate, there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is immediate, it then executes in the ancestor, and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates. As if there be an estate to *A.* for his life, or during the life of *C.* or any other sole estate of freehold, remainder to the heirs of the body of *A.* this is an estate tail executed in *A.*; but if there be an estate to *A.* for his life, or during the life of *C.* or any other freehold, remainder to *B.* for life, remainder to the

the heirs of the body of *A.* this is only a present freehold in *A.* with a vested remainder to him in tail, to take effect in possession after the determination of *B.*'s estate. If the particular estate were to *A.* and *B.* jointly for their lives, remainder to the heirs of the body of *B.* this would be an estate tail in *B.* executed *sub modo*, that is, so as not to sever the jointure, nor intitle the wife of *B.* to dower. 1 Inst. 184. a.
Perk. f. 334,
337.

But in the cases wherein the ancestor does not take the legal freehold either expressly or by implication, the limitation to the heirs of his body will be a contingent remainder. As where *A.* made a settlement to the use of himself and his heirs until an intended marriage, and afterwards to the use of his wife for life, and after her decease, to the use of trustees and their heirs during his own life, upon trust, to permit and suffer *A.* to take the profits, remainder to first and other sons of the marriage, remainder to the heirs of the body of *A.* it was adjudged the limitation to the heirs of the body of *A.* were words of purchase, and of course a contingent remainder; because *A.* took only a trust estate for life, the use being limited to the trustees, and the legal estate for his life executed in them by the Stat. of Uses: so where there was a lease and release by *A.* to trustees and their heirs, to the use of *A.* for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs male of the body of *A.* this remainder to the heirs of the body of *A.* was adjudged not to vest in *A.* but was a contingent limitation, and void, for reasons which will appear hereafter. For further learning as to this point I shall refer the reader to the cases cited in the margin. Carth. 272.
Tippin v. Coffin.

2 Salk. 679.
Adams v. Savage.

1 Inst. 22. b.
1 Mod. 121.
Pybus, v. Mitford.

3 Mod. 207. 3 Keb. 704. Southcote and Stowel.

But

Moor 284.
Fenwick v.
Mitford.
Vide also 2
Rep. 91. b.
Moor 721.
Earl of Bedford's case.

But where the ancestor is himself the grantor, there a limitation to his own right heirs will continue in himself as the reversion in fee, and is not a remainder, although the freehold is expressly limited from him : as where a fine was levied to the use of the wife of conusor for life, remainder to the use of *B.* in tail, remainder to the use of the right heirs of conusor, this was adjudged a reversion in the conusor.

Skinn. 408.

Here, however, we are to observe, that if there be a limitation to a man's heirs in any deed, and afterwards he, by other means, becomes seised of the freehold, in this case the two estates will not become united in him, but the limitation to his heirs will still continue, what it originally was, a contingent remainder ; as where *A.* was tenant for life of *B.* remainder to the right heirs of *B.* *A.* afterwards granted his estate to *B.* so that he became tenant for his own life, remainder to his right heirs ; yet this remainder continued a contingent remainder.

The general rule above laid down, respecting a subsequent limitation to the heirs after an estate of freehold given to the ancestor in the same conveyance, holds equally in the case of a will as of a conveyance at common law, wherever the limitation in question gives a legal and not a trust estate. This I shall endeavour to prove in the next following pages.

The rule was originally introduced to prevent frauds upon the tenure : if such a limitation had been construed a contingent remainder, the ancestor might have destroyed it for his own benefit, if occasion had called for it ; if not, he might have let it remain to his heir in as beneficial a manner as if it had descended to him, at the same time that the lord would have been deprived

deprived of those fruits of his tenure which would have accrued to him upon a descent. The mischief to be obviated was the same whether the limitation was created by deed or devise, therefore the rule took place equally in both cases. The reason upon which this rule of law was first established ceased, it is true, with the abolition of those fruits of tenure which it was calculated to preserve; but the subjects of the law still continue; there are still the same limitations of estates for the rule to operate upon, and the law, having been once so established (no matter upon what ground), the courts of law (who considered themselves as intrusted with the power, not of abrogating or altering, but only of expounding and pronouncing established laws) have, through a long succession of determinations on this point, grounded their judgments entirely upon that rule. The Court of Chancery indeed does not consider itself tied up to an implicit observance of the same rule in respect to the limitations of trust estates. And from thence some have endeavoured to draw an argument, that the courts of law should indulge the same latitude of construction, assuming it as a principle, that there is no sound distinction between the devise of a legal estate and a trust; but this is *petitio principii*; for I believe there is not a point in our books more clearly and accurately agreed than the distinction between a legal devise and a trust, as will appear from the cases I shall mention by and by. In the mean time, as to the soundness and reason of the distinction, we are to consider, that trusts were the mere creatures of confidence between party and party, and totally distinct in almost every quality, from those legal estates which were the subjects of tenure.

tenure. They were in their nature independent of tenure, and therefore not the objects of those laws which were founded in the nature of tenure. They were rights arising solely out of the intent of the party who created them, and therefore such intent could be the only guide in the execution of them. Consequently, when a court of equity, in certain cases of trust estates, deviates from the rule above laid down, it does not in so doing depart at all from any rule of law by which it was ever bounden: it only exercises that conscience and discretion to which trust estates were in their nature originally and necessarily subject. And yet even the Court of Chancery, in order to preserve as near a correspondence as may be between the rules of property, with regard to trust estates, and those laws by which legal estates are regulated, considers itself as bounden, even in the case of trust estates, to decree according to the rule I have been speaking of, wherever it can be done without manifest violation to the intention of the

1 P. W. 142.
Bale v. Coleman.

parties. As when one devised lands for payment of his debts, and afterwards as to part to *A.* for life, with power to make leases, remainder to the heirs male of the body of *A.* though this was but the devise of a trust and executory, yet it was held to be an estate tail in *A.*; for Lord Chancellor said, that it could not be inferred with any certainty from the power of leasing given by the testator, that no estate tail was intended. So where there was a devise in trust for *A.* for life, afterwards to *B.* for life, afterwards to the heirs of *B.*'s body, Lord Hardwicke decreed a conveyance in tail to *B.* upon this principle, that a court of equity in cases of trust estates was not to over-rule the legal construction

Garth v. Baldwin.
2 Vezey, 646.

of

of the limitation, unless the intent of the testator or author of the trust should appear by declaration plain.

But will any one say, that because the Court of Chancery is not bounden by a rule, which in its nature and design had no relation to the objects of that court's jurisdiction, that therefore a court of law shall cease to be bounden by it in their decisions on cases of a very different kind, and which were the original, and have ever since continued, the immediate objects of that rule? The same authority that can convert a court of law into a court of equity in one instance, and abolish all distinction between legal estate and trusts, may (without the *obsolete* aid of an act of parliament,) complete the plan of improvement on our ancient laws, and tell us there is no sound distinction at all between the supposed objects of the jurisdiction of the one court and those of the other: for a court of law and court of equity in this kingdom differ but in name.

Some instances there are, even in cases at common law, wherein the subsequent limitation to the heirs of the body have been so qualified and corrected by other additional words, as to amount to words of purchase, and not of limitation; but I believe no one case can be found, before the late case of *Perrin and Blake* in the K.B. 1769, and where a perfect unqualified limitation to the heirs, or heirs of the body (in the plural number), preceded by a limitation of the legal estate for life, to the ancestor in the same deed or will, has been determined not to vest in that ancestor, but in the heir by purchase. Many cases it is true are cited to prove such a determination to have been no uncommon thing. But, with submission,

mission, I apprehend it no difficult matter to shew, that no one of the cases so cited comes up to the position it is intended to support. It will be found on examination, that some of them are cases of trust estates, therefore only prove what is not denied; in others, the word *heirs* is not made use of, but the limitation is by words which have not the same established legal import and extent, such as the word *issue* or *sons*, and such like; and in others again, there is no limitation of the legal freehold to the ancestor; and there is not one of them in which the words *heirs*, or *heirs of the body* are used, wherein those words are not restrained or qualified, either by reference or else by additional words. Thus, for instance, in the case of *Lisle and Gray*, the general import of the words was qualified by reference to the preceding limitation to the first, second, and certain other sons in tail, and also by words of limitation grafted on them. So in the case of *Law v. Davis*, the word *heirs* was corrected and explained by subsequent limitations to first and other sons in tail. The case of *Algood and Witbers* in Chancery, in 1735, was the case of a trust estate; so likewise was the case of *Bagshaw and Spencer*. The case cited by Lord *Hale* was a limitation to one for life *et non aliter*, and after his death to the sons of his body. The case of *Backhouse v. Wells* was a limitation to the *issue male of his body*, with words of limitation grafted thereon. In neither of the two last cases is the word *heirs* mentioned. And in the case of *Backhouse and Wells* it is observed, that Lord *Parker* said, had the words *heirs-male* been used instead of *issue-male*, the operation of the law would have been too strong, for the intention of the testator. In the case of

Cbeek

Raym. 278.

2 Ld. Raym.
1561.

1 Vezey, 142.

1 Ventr. 231.

1 Eq. Abr.
184. pl. 27.

2 Strange,
731.

2 Ld. Raym.
1440.

Cheek v. Day, or *Clark v. Day*, the limitation was to the *beir* (*lawfully begotten*) in the singular number, and words of limitation grafted thereon; and indeed as *Fitz-Gibbons* states the case as taken from the roll, there is a limitation in fee grafted on the word *beir*, which carries this case still further from the point; for the limitation being to the *beir* (of the body, or lawfully begotten), could not give a fee to the ancestor, and an estate tail in the ancestor could not have answered the superadded words of limitation in fee to the heir. *Vide* 1 Lord Raym. 206. The case of *Doe and Laming* was of gavelkind lands, where the words *females as well as males*, annexed to the words *beirs of the body*, were incompatible with and expressly broke the descent; for gavelkind lands cannot descend in that manner; and besides there were words of limitation in fee grafted on the words *beirs of the body*, which could not have been satisfied by an estate-tail in the ancestor. Other cases are commonly cited wherein no estate at all, or at most a trust estate, or term for years only, is limited to the ancestor. Of these I shall take no notice: for the question is not, Whether the words *beirs of the body* may not, under certain circumstances, be taken as words of purchase? but, Whether those words, standing perfect and unexplained, and preceded by a limitation of the legal freehold to the ancestor in the same will, have ever been construed words of purchase? After the observations I have been making, I conceive no one of the preceding cases can fairly be urged as an authority that they have; and as to all those wherein the legal freehold is not limited to the ancestor, they are entirely out of the present question. Thus stood the old law as to this

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Mor. 593.
(cited Lord
Raym. 203,
and Gib. 24.)

2 Barr. 1100.

point before and until the year 1769, when the case of *Perrin and Blake* came before the court of King's Bench. This was a case in point, which fully supplied all the insufficiencies of all the preceding cases, and for some time existed a new and authoritative answer to all former decisions upon the same point. The case was this, a testator devised in the following words: It is my will and pleasure that my sons do not convey *a greater interest than for term of their natural lives*, and to that intent I give, devise, and bequeath my land to my son *J. W.* and if my wife should be brought to bed of a son, to my said son *J. W.* and the said infant for *term of their natural lives*, remainder to my brother-in-law *J. G.* and his heirs during the lives of my said sons, remainder over to *the heirs of the body of my said sons*, &c. No other son was born, and the question was, what estate *J. W.* took under this will? And it was adjudged in *K. B.* that he took but an estate for life. But the unprecedented judgment given in that case has since been reversed in the Exchequer Chamber, and the venerable train of preceding uniform judgments upon the same point restored to its former authority. I shall therefore consider those judgments as once more laying claim to our attention, however idle it might have been to have mentioned them, whilst the doctrine delivered in the case of *Perrin and Blake* stood intitled to the name of law.

2 Ventr. 311.

The first case I shall mention was that of *Burcett and Durdant* (a case commonly cited on the other side) where a devise was of lands to a trustee, and his heirs, to permit and suffer *A.* during his life to receive the profits without impeachment of waste, and after the decease of *A.* then

then to the *heirs-male of the body of A. now living*, and to such other heirs, male, and female, as he should afterward have of his body. In that case it seems the first question was, whether the estate for life did not execute in *A.* by the statute of uses, for if so (says the reporter) he would be seised of an estate tail. But the court resolved the first limitation was a trust, and not an estate executed. Now this was a point the court had no occasion to have entered into or have given any resolution upon, if the other and principal point of the subsequent limitation vesting or not in the ancestor had not depended upon it; therefore it follows that if the estate for life had been executed, and not a mere trust estate, the after limitation would have vested in the ancestor, notwithstanding the strong intention of the testator to the contrary.—So where a devise was to trustees and their heirs to permit *A.* to take the profits for his life, and after to the use of the heirs of the body of *A.* with power to *A.* for making a jointure, it was adjudged that the estate for life was executed in *A.* by the statute of uses, and that he had an estate-tail executed.—So in the case of *Lord Glenorby v. Bosville*, where lands were devised to be conveyed to *D.* for life, remainder to her husband for life, remainder to the issue of the body of *D.* Lord Chancellor said, he should upon the first question make no difficulty of determining it an estate tail if it were an immediate devise.—So in the case of *Papillon v. Voice*, Lord King agreed, that the intent was plain to give an estate for life only, with a contingent remainder of the inheritance, upon the clause appointing trustees to preserve contingent remainders, yet this remainder was within the general rule, and must operate as words of limitation,

Broughton
and Langley,
2 Salk. 679,

Caf. Temp.
Ld. Talb. 3.

2 P. W. 471.

tion, and consequently create a vested estate tail in *B.* and that the breaking into this rule would create the utmost uncertainty. — It is to be observed, that the force of these two last cases is stronger than if the words had been *heirs of the body*, because the word *issue*, is not so appropriated a word of limitation as the word *heirs*, for which *vid.* *1 Strange* 731. *Cro. Eliz.* 40. and

2 Sira. 1125

2 Ark. 246.

1 Vent. 230. — Again, in the case of *Coulson* and *Coulson*, which was a devise to *C.* for life, remainder to trustees to support contingent remainders during the life of *C.* remainder to the heirs of the body of *C.* upon a question whether *C.* took an estate tail or for life, all the judges of *B. R.* certified, that an estate-tail in remainder vested in him. — I shall mention one more case, which was a devise to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.*

A. died in the lifetime of the testator, and it was adjudged by the whole court, that the heirs of *A.* took nothing, because the word *heirs* was a word of limitation; the words of Lord Chief Justice *Parker*, in delivering the opinion of the court upon this case are remarkable, “ and thus (says

† P. W. 397.
Goodright v. Wright.

“ he) has the law been long clearly settled as to “ this point, even ever since *Brett* and *Rigden*’s “ case; but on this occasion I have been the “ larger in delivering the judgment of the court, “ because of some late endeavours to invalidate “ this rule, which by the way may make it proper “ to observe, that the altering settled rules concerning property is the most dangerous way of “ removing land marks.”

It may be proper to remark, that although words of limitation grafted on the words *heir male* or *heir of the body*, when in the singular number, may convert them into words of purchase,

as in *Archer's* case, and in the case of *Cbeek* or *Robins. Gavel Clerk* and *Day* before cited, yet those words, though in the singular number, if not attended with words of limitation upon them, are words of limitation, and if those words be in the plural number, as *beirs male* or *beirs of the body*, in that case it seems even words of limitation grafted on them will not control their legal operation, or make them words of purchase.

Kind 96.

¹ Vent. 230.

² Cro Eliz. 313.

¹ Rep. 93. b.

Shelly's case,

² *Ld. Raym.*

1440.

Goodright v.

Pulleyn.

² *Burrow*

1102. case

cited.

It must be admitted that those who shall argue against the strict observance of the rule I have been speaking of, may sometimes chance to have the intention of the testator on their side; but let them consider whether a rule of law, inviolably observed for more than three hundred years past, can ever be a decent sacrifice to the presumptive construction of an indetermined or illiterate testator's intention. So long as certain technical expressions shall be allowed their fixed legal import and operation, it is in any man's power to secure the limitation of his property from litigation and precarious construction, by applying to those whose business it is to be acquainted with the force and import of such expressions. Where any considerable property is concerned, a man's own interest in securing the effect of his intention will lead him to such a step; where the property is so inconsiderable as not to be thought worth the trouble or expence of such assistance, the disposition of that property, and of course the testator's intention with respect to it, is less material and momentous. Some cases it is true may happen wherein such application may accidentally be impracticable; but is every testator to be denied this power of effectuating his intention, because accident may put it out of the

reach of some few, and some others may want inducement to use it? If no technical expressions are to be exempt from the operation of an occasional construction, where is the testator who can make his own will? The most careful and guarded endeavours which a man shall exert for that end, will only amount to leaving some precarious instructions behind him, the force and effect of which must depend on the discretion or disposition of those in whom the power of construction shall be reposed for the time being; it is their discernment, humanity or spirit of improving old laws, must in fact *make* the will of every testator in the kingdom.

We now come to the second class of cases, which are exceptions to the last of the four descriptions of contingent remainders above given; these are grounded upon that respect which (within certain bounds) is paid to the intent of a testator wherever it can be collected from any particular expressions in his will. I mean the cases wherein a limitation in a devise to the heir special of a person living has been adjudged a *descriptio personæ*, or sufficient designation of the person for the remainder to vest, contrary to the general rule that *nemo est hæres viventis*. But these cases have been either where the limitation to the heir special, has been qualified by the words *now living* or some other circumstances have appeared in the will to manifest the testator's intention, that the estate should vest. As where *A.* devised lands to *J. S.* and his heirs for the life of *B.* upon trust to permit *B.* to receive the rents and profits during his life, and after *B.*'s death to the heirs-male of the body of *B. now living*, and to such heirs male or female as he after should have of his body, *B.* had issue *C.* a son

2 Ventr. 311.
Burchett v.
Durdant.

son then living, it was adjudged a trust estate for life in *B.* and that the estate vested in *C.* immediately, and was not contingent, for that the words *now living* made the limitation a sufficient designation of the person. A like judgment was given in another case on the same will, on the very same point; which judgment was reversed in the Exchequer Chamber, and that reversal again reversed in the House of Lords, as appears in the report cited in the margin. It is to be observed, that Chief Justice *Holt* afterwards in the case of *Broughton* and *Langley* ^{2 Salk. 677.} denied the foregoing case to be law, for that the estate for life was executed in *B.* by the statute of uses, and consequently the after limitation gave him an estate-tail. — Also where there was a devise after several preceding terms of years in remainder to the heirs of *J. S. begotten*, and *J. S.* at that time had three children living, this was adjudged a vested remainder in the eldest son of *J. S.* some stress being laid on the word *begotten*, and because the testator took notice of the ancestor's being living at that time, as well as in consideration of some other circumstances in the will from whence the court collected such to be the testator's intent. This judgment was afterwards reversed in the Exchequer Chamber, and that reversal again reversed in the House of Lords. We are to observe however, that in no one of these cases the ancestor took the legal freehold.

Having sufficiently noticed the general exceptions to the literal extent of the four descriptions I have above given of contingent remainders, it may now be proper to explain the distinction betwixt that kind of uncertainty which makes a remainder contingent, and an uncertainty of a

different kind which appears to have been sometimes confounded with it, I mean the uncertainty of a remainder's ever taking effect in possession; a distinction not always attended to, but absolutely requisite to complete an accurate notion of what is in law considered as a contingent estate. For wherever there is a particular estate the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse*, in that case, notwithstanding the nature and duration of the estate limited in remainder may be such, that it may not endure beyond the particular estate, and may therefore never take effect or vest in *possession*, yet is it not a contingent but a vested remainder. As if a lease be to *A.* for life remainder to *B.* for life or in tail, here, notwithstanding *B.* may possibly die or die without issue in the life of *A.* and consequently never come into possession, yet is his remainder vested *in interest*, and by no means comprised in the legal notion of a contingent estate.

It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail is and must be liable. The present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. For instance; if there be a lease for life, remainder to *B.* for life, here the remainder to *B.* although it may possibly never take effect in possession, because *B.* may die before *A.* yet, from the very instant of its limitation, it is *capable* of taking effect in possession, if the pos-

possession were to fall by the death of *A.* it is therefore vested in interest, though perhaps the interest so vested may determine by *B.*'s death, before the possession he waits for may become vacant. On the other hand, if there be a lease for life to *A.* and after the death of *J. D.* remainder to *B.* in tail, in that case the remainder to *B.* is not *capable* of taking effect in possession, although the possession should fall by the determination of *A.*'s estate: but if *J. D.* chance to die before the determination of the particular estate, then does *B.*'s remainder by such event become *capable* of taking effect in possession when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of *J. D.* This very essential alteration in the nature of *B.*'s remainder, occasioned by the timely event of *J. D.*'s death is the change of a contingent into a vested estate; before that event it had not the *capacity* of vesting in possession, and it was doubtful whether it ever would have it or not, it was therefore not vested at all: by that event it acquires the *capacity* of vesting in possession when the possession becomes vacant; it is therefore vested in *interest*, though it is yet uncertain whether it ever will vest in *possession*; for it is still possible that *B.* may die without issue during the continuance of the particular estate.

In short, upon a careful attention to this subject, we shall find, that wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, that the preceding estate may by any means determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary

trary, wherever the preceding estate (except in the instances before noticed, as exceptions to the descriptions of contingent remainders) is limited so as to determine on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse*, or wherever it is limited so as to require the concurrence of some dubious, uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect, such remainder is contingent.

I am the more particular on this point, from a desire of preventing the errors which must affect our conclusions upon questions of law concerning this subject; should the uncertainty of taking effect in possession form any part of our notion of a contingent remainder, such a principle would scarcely fail to mislead us in every case of the least doubt. Suppose a lease be to *A.* for life, remainder to *B.* during the life of *A.* and the question to be put, whether this remainder to *B.* be a vested or a contingent interest? Upon the principle last mentioned, this remainder, which would be absolutely void were it not for the possibility of its taking effect by the forfeiture or surrender of *A.* must necessarily be deemed contingent; because such forfeiture or surrender, upon which its taking effect in possession entirely depends, are doubtful, uncertain events, which probably may never happen. There are instances of this sort of argument at the bar. Now, it is very true, such a remainder as I have here instanced may never take effect in possession: it depends on a dubious, uncertain event whether it shall or not, nay the probability is against it; yet, certain it is, there are
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not wanting cases enough in our books to prove such a remainder to be a vested interest. But this is not the only instance wherein the same principle would lead us into mistakes. It would carry us much farther, and prove many other remainders to be contingent, which have ever been undoubtedly considered as perfectly vested as any remainders whatsoever. Now, if we examine the same case by the distinctions I have laid down, we shall find it fall clearly under the description of a vested remainder; for here is a preceding estate to determine on an event which certainly must happen, (*viz.* the death of *A.*) and the remainder is so limited to a person *in esse*, that the preceding estate may by some means (*viz.* by forfeiture or surrender) determine before the expiration of the estate limited in remainder, *i. e.* before the expiration of *A.*'s life; accordingly, if *A.*'s life be not expired at the determination of the particular estate, which it will not if *A.* should commit a forfeiture, or make a surrender, then will the remainder take effect in possession: therefore it comes expressly within the terms of the foregoing description of a vested remainder; and as this conclusion corresponds with the authorities in point, it may fairly be considered as an instance of the justness of that distinction from which we have derived it.

I am very well apprised that Lord Chief Justice *Lee*, in his argument in the case of *Smith*, on the demise of *Packburst et al.* as reported by *Viner*, seems to state the same case as an instance of one sort of contingent remainder, in the words following: "2dly, Where the particular estate may determine before the remainder can commence, as an estate to *A.* for
 " life,

Bac. Abridg.

vol. iv. p. 306.

in the margin.

“ life, and from and after the determination of
 “ his estate, then to *B.* during the life of *A.*
 “ this is good by contingency, that is, if *A.*
 “ forfeit his estate by alienation, or otherwise, in
 “ his lifetime.” This passage, I observe, is cited
verbatim in the definition of a contingent re-
 mainder, in *Bacon’s Abridgment*. I wish its
 force had been duly weighed before it had been
 offered to the reader in that detached form, which
 must necessarily mislead him. The argument at
 large, as reported by *Viner*, is not always at
 hand. The quotation, as it stands detached in
Bacon, has nothing to impugn or invalidate its
 authority, though a small degree of attention to
 the case itself will convince us, that the passage
 I have quoted is misreported. To prove this, I
 shall only cite the following passage, which oc-
 curs a few lines lower in the same argument :
 “ As a lease to *A.* for life, remainder to another
 “ during the life of *A.* this is good, because by
 “ possibility the remainder may take effect, by
 “ the tenant’s for life alienating or committing a
 “ forfeiture, this possibility is therefore con-
 “ sidered as an interest in the grantor, which he
 “ may limit, and is that sort of interest which
 “ the trustees have for preserving contingent
 “ uses, and is not a mere right of entry, nor a
 “ contingent remainder, but a vested estate, to
 “ take effect by those ways and methods of de-
 “ termination to which the particular estate was
 “ subject when it was created. This last pas-
 sage goes directly to the point, and is conclu-
 sive: it expressly states the very same case, and
 affirms, that such remainder is not a contingent
 but a vested estate, to prove which several au-
 thorities are there cited; for all which I refer
 the reader to the argument itself. Agreeable to
 this

this idea was the judgment given in that case, so far as it respects the point I am now considering; which judgment was afterwards affirmed in the House of Lords. It is evident therefore, the first cited passage must be erroneous, and I should therefore have passed it over without notice, had I not apprehended it might have been mistaken for an authority, by those who should meet with it detached from the case at large.

It sometimes happens, that contingent remainders intervene between the particular estate and other limitations over; upon which cases we must observe, that wherever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested if it be made to a person *in esse*. As a feoffment to the use of feoffor for life, and, after his death, to the use of his first and other sons in tail, remainder to divers, and afterwards to *J. D.* in tail, the feoffor having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not *in esse* were contingent; but the uses to persons *in esse* vested immediately, and that the contingent uses when they should come *in esse*, would vest by interposition, if the estate for life, which ought to support them, were not disturbed. So where, in the same conveyance, an estate for life is limited to a person, and after that a contingent remainder to another, followed by a remainder to the heirs or heirs special of the first tenant for life, this last limitation shall be esteemed executed only *sub modo*, that is, upon such condition as to open and separate itself from the first estate for life when the contingency happens. So a subsequent contingent remainder may become vested before a pre-

Vin. v. 18.
fol. 413. pl. 8.
3 Atkins. 135.

Hutton, 119.
and 1 Rep.
133. Chud-
leigh's case.

11 Rep. 80.
Lewis Bowle's
case.

2 Roll. Abr.
111 Uvedal
v. Uvedale.

a preceding one, and the preceding one will be no obstruction to its vesting: as where *A.* was tenant for life, remainder to his first and other sons in tail-male successively, remainder to *B.* for life, remainder to his first and other sons in tail-male, then *B.* having issue a son, and *A.* no son, *A.* cuts timber trees, the son of *B.* who is then tenant in tail, shall have them, for the property thereof is in him by reason of his inheritance, and the remainder to the first and other sons of *A.* is no impediment, being but a possibility which may never happen.

1 Salk. 224.
Lord Raym.
209. Lod-
dington v.
Kime.

But where there is a contingent limitation in fee, no estate limited afterwards can be vested; as a devise to *A.* for life, without impeachment of waste, and if he have issue-male, then to such issue-male and his heirs for ever, and if he die without issue-male, then to *B.* and his heirs for ever; in that case the court held the remainder to *B.* and his heirs not vested, because the precedent limitation to the issue of *A.* was resolved to be a contingent fee; and they took the distinction I have have stated, that where the mean estates limited are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest, but that no remainder limited after a limitation in fee can be vested.

Vid. 3 Atk.
728. Tracy
and Lethulier.

But it seems a contingent determinable fee, limited to trustees for some special purposes only, will not prevent an after limitation to one *in esse* from being vested.

Sometimes a remainder is limited in words which seem to import a contingency, though in fact they mean no more than would have been implied without them, or do not denote a condition precedent, but only mark the time when the remainder is to vest in possession. As
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an estate to *A.* for life, and afterwards to his first, second, third and fourth sons in tail, and if his fourth son die without issue, then to *B.* this is a remainder vested in *B.*; for it is the same thing as if it had been said *remainder to B.* The fourth son's dying without issue is implied; it is not a condition, but an expression of the time when the remainder is to vest in possession. So a devise of *Blackacre* and *Whiteacre* to *M.* for life, and after her death, *Blackacre* to *B.* and his heirs for ever, and *Whiteacre* to *C.* and his heirs for ever; *Item*, I will, that the survivor of them shall be heir to the other, if either of them die without issue: this is an immediate estate-tail with remainder limited over; for the subsequent clause restrains the first limitation, and the words *if either of them die without issue* mark the time when the remainder over to the other is to take effect in possession; but if it had been, *if either of them die without issue, living the other, or before such an age*, the remainder would then have been contingent. For further instances, *vide* the cases cited in the margin.

Moor 487.
Holcroft's case.
Cro. Ja. 695.
Chaddock v. Cowley.
Vide Raym.
28. Plunkitt v. Holmes.
Cro James
416. Web. v. Herring 697.
Foy and Hynde. Raym. 428. 1 Salk. 229. Scatterwood v. Edge.
Gill. Eq. Rep. 74. Jones v. Westcomb. 1 Wilson, 105.

Some instances are to be met with where the contingency, upon which the remainder was limited, has been considered as a condition subsequent instead of precedent, so that the remainder vested immediately subject to be defeated by the condition when it should happen, in the room of not taking effect till it happened. Thus, where a fine was levied to the use of *A.* and his heirs, if *B.* should not pay 10 s. to *A.* before a certain day, and if he should, then to the use of *A.* for life, remainder to the use of *B.* in fee; the condition in this

1 Roll. Abr.
415. pl. 12.
Spring and Caesar.

2 Show. 398.
 Stockerv. Ed-
 wards.
 Vide also 3
 Levin. 132.
 Edwards v.
 Hammond.

this case was held a condition subsequent with respect to *A.* so that he took an estate in fee until *B.* paid the 10 *s.* Here it was evidently the intent that one of the limitations should take effect immediately; the latter could not take place till the 10 *s.* paid. therefore it must be the first. So where there was a surrender to the use of the youngest son, and the heirs of his body, if he attained the age of eighteen, and if he died before eighteen without issue-male, then to the right heirs of *A.* it was held to be a condition subsequent with respect to the youngest son, and therefore the remainder vested immediately subject to be defeated by the condition of his dying without issue-male before he attained the age of eighteen. Here it was evidently the intent, that the estate should not go to the heirs of *A.* if the youngest son died before eighteen leaving issue; but if the estate was not to vest till he attained eighteen, this intent could not have been satisfied. Constructions of this sort, however, are only allowed where the limitations are by way of use, as will be shewn hereafter.

Of the Nature of the Contingency upon which a Remainder may be limited.

IN the limitation of contingent remainders it is necessary that regard be paid to the nature of the contingency upon which the remainder is intended to take effect; for that contingency may

may be liable to four capital objections, any one of which would be sufficient to render the depending remainder absolutely void.

The objections may be as follow :

1st, The contingent event's being an illegal act.

2^{dly}, The remote probability of the contingent event.

3^{dly}, The condition being repugnant to the preceding estate.

4^{thly}, The condition enuring to defeat the preceding estate.

As to the first objection, Lord Coke tells us, 2 Rep. 51. the law will never adjudge a grant, by reason of a possibility or expectation of a thing which is against law, for the same is *potentia remotissima*, and which by intendment of law *nunquam venit in actum*; of this nature was the possibility of a man's entering into religion by becoming professed. Upon the same principle, a limitation to a bastard not *in esse* is held to be void; for the law does not favour such generation, or expect that such should be. Vid. also 1 Leon. 189. pl. 289. Cro. El. 509.

As to the second point, it is requisite that the possibility upon which a remainder is to depend should be a common possibility and *potentia propinqua*, as death, or death without issue, or coverture, or the like. Therefore a remainder to a corporation, which is not in being at the time of the limitation, is void, although it be erected during the particular estate. So if there be a lease for life, remainder to the heirs of J. S. though this remainder be good, because by common possibility J. S. may die during the particular estate, yet if there be no such person as J. S. at the time of the limitation, notwithstanding such a person should afterwards be born,

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and

and die during the life of the tenant for life, his heir shall not take by virtue of such limitation, because the possibility on which it is to take effect is too remote; for it amounts to the concurrence of two several contingencies, viz. *First*, That such a person as J. S. should be born; and *Secondly*, That he should also die during the particular estate; this is called a possibility upon a possibility, which Lord Coke tells us is never admitted by intendment of law.

1 Inst. 25. b.
184. a.

Upon the same ground ariseth the distinction between a remainder limited by a general name, and one limited by a particular name to a person *not in esse*. In the first case the remainder is good, as a limitation to the right heirs of J. D. who is alive, or *premogenito filio* of B. who has no son then born; but in the other case the remainder is void, as if a remainder be limited to G. son of D. in that case if D. hath not a son named G. at the time of the limitation, the law will not expect he should afterwards have a son so named, because it amounts to a possibility upon a possibility.

2 Rep. 51.

As to the third point we are to observe, that there are certain conditions which are held repugnant to, and incompatible with, the nature of an estate tail, such as a condition not to levy or attempt to levy a fine or suffer a common recovery; and wherever an estate is limited to take effect on the breach of any condition of that nature, such limitation is void of course, as if a man make a feoffment to the use of himself for life, remainder to his eldest son in tail, provided that if his eldest son attempt to levy a fine or suffer a recovery, that then his estate shall cease as if he were naturally dead, and remain over to another;

1 Rep. 130.
6 Rep. 42.
Mildmay's
case.

another; in this case the proviso is repugnant and therefore void.

With respect to the fourth and last objection, it is laid down as a rule in conveyances at common law, that every remainder must be so limited as to wait for the determination of the particular estate before it is to take effect in possession, and not to take effect in prejudice or Plowd. Com; exclusion of the preceding estate. Therefore a 24. b. remainder cannot be limited to take effect upon a condition which is to defeat the particular estate, whether such condition be repugnant to the nature of the estate to which it is annexed or not. Thus for instance, if a lease for life be made upon condition, that if a stranger pay to the lessor 20*l.* then immediately the land shall Plowd. Com, remain to the same stranger, this remainder is 29. b. void, for the tenant for life ought to have it during his life, and if so, during that time the stranger cannot have it; but had it been limited, that if a stranger pay to the lessor 20*l.* then, after the death of tenant for life, it should remain to that stranger, it would have been a good remainder. — The distinction between the two cases is this, in the latter the remainder is not to vest in possession till after the determination of the estate for life; in the former it is limited to take effect in possession on the performance of a condition, which is to defeat the estate for life, and not to wait till the particular estate be determined, which *ex vi termini* every remainder ought to do. — The same law holds with regard to a remainder limited to take effect on a condition which is to defeat a preceding remainder, as where *A.* seised in fee let to *B.* for life, remainder to *C.* for life, provided that if *A.* should have a son which should live to the age of 5 years, the

Cro. Eliz 362.

Cogan v. Co-

gan.

estate limited to C. should cease, and the land remain to that son in tail, it was adjudged, the estate limited to the son was void; because limited on a condition which was to defeat the preceding remainder to C.

But when it is said that a remainder limited on a condition which is to defeat the preceding estate is void, the rule must be understood only of remainders created at common law; for it is certain such a remainder may be good in a devise, as will be seen in the chapter of executory devises; and it also appears that by way of use an estate may be limited to cease as to one person upon a future event, and at the same time vest in another. As if a man make a feoffment

Brook Feoff. al
Uses, pl. 50.

in fee to the use of W. and his heirs till A. pay 40 l. to the said W. and then to the use of the said A. and his heirs, and the statute executes the estate in W. and afterwards A. pays the 40 l. there A. is seised in fee if he enters, by the opinion of several; but by some, A. shall not be seised in fee by the said payment unless the feoffees enter; therefore it seems to be the surest way to enter in the name of the feoffees and his own name; and therefore see that a man at this day may make a feoffment to uses, and that the use shall change from one to another by act *ex post facto*, by circumstance, as well as it would before the statute 27 H 8. of uses, thus says Brook in the place I have cited. — So where A. tenant in tail by indenture bargained and sold the lands to the use of J. S. in fee, in the indenture was a letter of attorney to make livery, which was made accordingly, J. S. by the same indenture covenanted, that if A. before such a day paid 40 s. that then J. S. and his heirs should stand seised, &c. to the use of A. and his heirs, and if A. did not

Leon. 25. pl.
21.
Benfionbe v.
Parker.

not pay, &c. then if the said Y. S. did not pay to the said A. within 4 days after 10 l. that Y. S. and his heirs should thenceforth be seised to the use of the said A. and his heirs, &c. and A. covenanted for further assurance; both failed of payment, B. levied a fine to Y. S. without any consideration. It was adjudged a good feoffment well executed by the livery, notwithstanding the words of bargain and sale only, and that the covenant to be seised to the new uses conditionally upon the payment and non-payment, being in one and the same deed, should raise the use upon the contingency according to the limitation of it. — So where one made a feoffment, and it was declared by the indenture that it should be to the use of himself, and A. his feme *ibot should be* after their marriage, and the heirs of their bodies, and he took A. in marriage; all the judges held, that although he were seised in fee in the mean time, yet, by the marriage, the new use should arise and vest, if there were no act in the mean time to destroy that future use, (as it was in *Chudleigh's case*) and judgment was given accordingly. — For more instances of such uses, *vid.* the cases cited in the margin.

Cro Eliz 439.
Woodliff v.
Drory.

The uses I have been speaking of are called shifting or secondary uses, and are allowed, because they were good before the statute 27 Hen. 8. of uses, and do not fall within any of the mischiefs which that statute was made to remedy; it seems however that they are not admitted in surrenders of copyhold estates.

Dyer 314. pl.
96.
Roll. Abridg.
41 c. pl. 12.
Ley 54. Moor
99. pl. 243.
3 Leon. 221.
p. 231.

There are also one or two instances of estates not copyhold, wherein these uses have not been admitted to arise; as where a feoffment was to

Vid. Cro.
Jac. 376.
Gilb. Ten.
244.
Lex Cust. 120.

Moor 742.
pl. 1022.
Gilb. uses,
138.

the use of *A.* for life, remainder to his wife for life, remainder to his right heirs, with a proviso that if his son interrupted his wife it should be to the use of his wife and her heirs, *A.* made a lease for years to commence after the death of his wife, and died, the son disturbed the wife, and it was resolved that the uses would not arise to give the wife the fee. The lease for years made to commence after the death of the wife is said to have been the reason of this judgment, for the reversion after the death of the wife being altered by that lease, the same use in the reversion which was in being at the disposition of the particular estate, and so conditionally limited to the wife, could not arise to her at the time of her death, and therefore could never arise at all. — So a use to *A.* and his heirs, provided that if he give a mortal blow to any person, that the use shall cease to him, and shall be to another, this is fraudulent to prevent an escheat, and therefore is void. — And where *A.* bargained and sold land to *B.* for 500 *l.* upon condition that if *A.* paid *B.* 500 *l.* he might re-enter, and be seised to the use of himself and his heirs, until he should attempt to alien without the assent of *B.* and then to the use of *B.* and his heirs, and a fine was levied to those uses, *A.* paid the 500 *l.* and entered, afterwards *A.* aliened without the assent of *B.* *Per* Lord Chancellor *Egerton*, No use will arise to *B.* the bargainee, because the bargainor, entering for the condition, ought to be in of the old use and estate, and cannot be seised to any other use; also the fine was levied to *B.* by which *A.* who was the comoror, and also the bargainor who came in by the use of the fine cannot stand seised to any other use, for then there would be use upon use.

Moor 633.
pl. 868.

Moor 761.
pl. 1054.

use. — But we are to observe the judgments in these last cases depended on the particular nature of circumstances *ex post facto*, or on the illegality of the condition, and do not in the least affect the general validity of these shifting limitations.

Of the Estate necessary to support a Contingent Remainder.

I Shall now consider what estate is required to support a contingent remainder; or, in other words, what kind of estate must necessarily precede it.

It is an invariable rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. This rule depends upon the necessity there is for the freehold to pass out of the grantor at the time the remainder is created. If no freehold passes how is the remainder man to have it? If it passeth at all, it must pass either in the particular estate or in some remainder limited after it; in a contingent remainder it cannot pass because such remainder at the time of its creation passeth to or vests in nobody, and if it passeth only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever rising at all, for that freehold then becomes vested in possession, which the contingent estate was limited to precede, and of

course there is no room left for the introduction of the contingent freehold. It follows therefore that some preceding vested estate of freehold must be limited, to give existence to such a contingent remainder.

1 Salk. 229.
Scatterwood v.
Edge.

Thus, where there was a devise to trustees for 11 years, and then to the first son of *A.* in tail, &c. and *A.* had no son at that time, it was agreed that such limitation was void as a contingent remainder, because there was no freehold to support it.—So where 2 devise was to *B.* for 50 years if he should so long live, remainder to the

1 Salk. 226.
Goodbright v.
Cornish.

heirs of the body of *B.* remainder to *C.* the limitation to the heirs of the body of *B.* was void for want of a freehold to support it.—But where an estate was limited to *A.* for 20 years, re-

2 Vern. 370.
Penbay v.
Hurrel.

mainder to trustees during the life of *A.* remainder to the wife for her jointure, remainder to the heirs of the body of *A.* there, though the particular estate was but for years, yet the contingent remainder to the heirs of the body of *A.* was good, because preceded by a vested freehold remainder to the trustees.

1 Rep. 134. 5.
Show. Caf.
Parl. 107.

The same rule holds good as well in limitation of uses as in estates executed in possession, though before the statute of uses, a use limited to *A.* for years, remainder in contingency would have been good, for the feoffees remained tenants of the freehold; but since that statute it is otherwise, for now no estate remains in the feoffees.—

2 Salk. 679.
Adams v. St.
vage.

Thus, where there was a lease and release by *A.* to trustees and their heirs to the use of *A.* for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs of the body of *A.* the court held this remainder was void, because there was no preceding estate of freehold limited to support it.

As for a contingent remainder for years, (if such estate be admitted), there can be no necessity for a preceding freehold to support it. For the remainder not being freehold, there can be no occasion for the freehold to pass out of the grantor in order to give it effect. But in the case of *Corbett v. Stone*, in which there was a Raym. 151. contingent estate for years limited after an estate for years, the court inclined to an opinion that a contingent estate for years could not be, because a lease for years operates by way of contract, and therefore the particular estate and the remainder estate operate as two distinct estates grounded on different contracts. But vid. 3 Lebn. 43. In Cranmer's Case.

Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant, it is sufficient if there subsists a right to such preceding estate at the time the remainder should vest, provided such right be a right of entry, and not a right of action only: For whilst a right of entry remains there can be no doubt but the same estate continues since the right of entry can exist only in consequence of the existence of the estate; but when the right of entry is gone, and nothing but a right of action remains, it then becomes a question in law whether the same estate continues or not, for the action is nothing more than the means of deciding this question. Another estate is in the mean time acknowledged and protected by the law till such question be solemnly determined in a court of justice upon the action brought.

Thus, if *A* be tenant for life with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry

12 Mod. 174.
Thompson v.
Leach.

entry of tenant for life will support the contingent remainders; but in this case if the contingent remainder does not vest before such a descent be cast as will take away the entry of tenant for life within the statute of *Hen. 8th.* and drive him to his action, then is the contingent remainder gone, because there no longer subsists any right of entry to support it, that right being turned into a right of action.—So where a gift in tail was to *A.* remainder to the right heirs of *B.* *A.* made a feoffment in fee, and afterward *B.* died, the right heir of *B.* was not intitled to the estate, because there was no particular estate either *in esse* or *in right* to support the remainder when it fell; but (said Chief Justice *Charleton*) if tenant in tail be disseised and dieth, the same shall not take away the right of the contingent remainder, for there the right of the particular estate remaineth to support the contingent remainder.

² Roll's Abr.
796, pl. 11.

So where *A.* covenanted to stand seised to the use of himself for life, remainder to his wife for life, remainder to his daughter for life, remainder to her first son in tail, and afterwards granted the reversion without consideration reciting the former settlement, and after that made a feoffment, it was resolved that the grant did not hinder the arising of the contingent uses because the grantee had notice, and therefore took it subject to the grantor's covenant to stand seised, and that the feoffment did not destroy the contingent estate, because the right of remainder for life in the daughter upon which she might have entered for the forfeiture did support it.

¹ Ventr. 189.
Lord Raym.
316.

But this right of entry to support a contingent remainder must be a *present* right, a future one will

will not do; it must also precede the contingency, and be actually existing when that happens, for if it only commences at the same instant with it, the remainder will not vest. Hence if baron destroys the particular estate of himself and wife during the coverture, the future right of the wife to enter at his death is insufficient. As where baron made a feoffment to the use of himself and his wife, and the heirs of the survivor of them, and afterwards made another feoffment of the same lands, it was adjudged that the right of entry in the wife was not sufficient to support the contingent fee, and vest it in her on the death of the baron. In this case we observe that the particular estate was not existing at the husband's death when the fee should have vested, for his second feoffment had destroyed it during the coverture, and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing.

Cro. Car. 102.
Biggot and
Smith.

But wherever the estates are limited by way of use, and are afterwards divested and turned to a right, it is holden necessary to the execution of the subsequent contingent uses, that either the tenant of some preceding vested use, or else that the feoffees should enter in order to re-vest the estate; for although the contingent uses are not destroyed by such a divesting of the preceding estate as turns it to a right of entry, as they would be if such estate was determined or turned to a right of action only, yet there must be a seisin in the feoffees to the contingent use before it can be executed. As this matter apparently involves some degree of difficulty in it, I shall endeavour to explain what may be collected from the

1 Rep. 120.

the arguments and resolutions of the Judges in *Cbudleigb's* case. It appears that the court in that case resolved that upon a conveyance to uses there is no actual seisin left in the feoffees; but as to all the uses *in esse*, and which vest immediately, the seisin is presently transferred unto the *cestui's-que* use, and as to the uses not *in esse*, there is no present seisin existing any where, but only a contingent seisin in the feoffees, *i. e.* the possibility of a seisin to those uses when they come *in esse*, which seisin (till then contingent only) will arise and exist in the feoffees in order to serve the contingent uses, when the contingency happens, if the estates limited in the conveyance to uses be not in the mean time divested and disturbed; but if the estates happen to be first divested or disturbed, then will that possibility of a seisin in the feoffees, which is to take effect on the contingency, be divested as well as the other estates, and must be reduced and re-vested before the contingent uses can be executed, *vid. Cbudleigb's* case.—Now if this divesting or disturbance of the preceding uses has operated so far as not to leave a right of entry in any preceding vested estate, then is the contingent use entirely gone as we have shewn before; but if a right of entry is left, then may the tenant who has such right of entry, by making such entry, re-vest the estates which were divested, and amongst the rest the contingent seisin of the feoffees will be thereby re-vested: But if no such entry should be made by any such tenant, then must the feoffees enter themselves to re-vest their contingent seisin, otherwise there will exist no seisin to be executed and transferred by the statute to the contingent use. Hence if the feoffees should bar their own right of

of entry, upon such an occasion, by feoffment, release or otherwise, the contingent use can never be executed for want of a seisin to it, and the *cestui-que* use will have no other remedy than against the feoffees in a court of equity for breach of trust. As if a feoffment be made to the use of *A.* for life, remainder to the use of *B.* for life, remainder to the use of the eldest son of *B.* in tail, &c. here the feoffment of *A.* will not destroy the contingent remainder to the son of *B.* because of the right of entry in *B.* upon the forfeiture of *A.* and if *B.* enters either in the lifetime of *A.* or after his death, this shall reduce the contingent remainder; so that if a son be born in his lifetime it shall be executed by the statute without any re-entry of the feoffees. But if after the feoffment of *A.* *B.* dies without having entered, though he should have a son born in his lifetime, that son cannot enter the contingent seisin having been disturbed and not revested. But in this case the feoffees may enter, and thereby revive the contingent use, which by their entry will be executed in such son by the statute. But if after the death of *B.* without entry the feoffees should by feoffment or otherwise bar their entry, then can the contingent use never be executed for want of a seisin to it.

But this necessity for re-entry, in order to re-vest and restore contingent estates, only holds in estates limited to uses; and exists by virtue of the statute of uses which requires a seisin existing in order to be executed and transferred to the use.

It is necessary that the estate supporting, and the remainder supported should both be created by one and the same deed or instrument; therefore an estate for life settled by *A.* on *B.* by deed will

not

Roll's Abr.
797. pl. 12.

Ibid. pl. 13.

Ibid. 14.

Ibid. 15.

Vid. 1 Rep.
67. and 135.

4 Mod 316.

not enure to support a contingent remainder given by the will of *A.* to *B.*

Of the Time when a Contingent Remainder should vest.

WE are now to consider the time at which it is requisite a contingent estate should vest in interest, that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect ought to happen.

1 Rep. 66.
135.

Plowd. 25.

It is not only necessary that a vested freehold estate should precede a freehold contingent remainder, as we have already seen, but some preceding freehold estate must subsist and endure until the time when the contingent remainder vests, that is, until the contingency comes to pass; for it is an invariable rule, that every remainder must vest either during the particular estate, or else at the very instant of its determination. So that if a lease be made to *A.* for life, and after the death of *A.* and one day after, the land shall remain to *B.* for life, this remainder to *B.* is void, because it cannot take effect immediately upon the determination of the preceding estate. This rule was originally founded on feudal principles, and was intended to avoid the inconveniences which might arise by admitting an interval, when there should be no tenant of the freehold to do the services to the Lord or answer to *Strangers præcipes*, as well as to preserve

serve an uninterrupted connection between the particular estate and the remainder, which in the consideration of law are but several parts of one whole estate.

It follows from the rule I have just mentioned, that where the event on which a contingent remainder is limited to take effect, does not come to pass by the time at which the preceding estate determines, it never can arise or take effect at all. Thus, where *A.* was tenant for life, remainder to his eldest son in tail, who died, leaving his wife *enfeint* with a son, who was afterwards born, the question was, Whether this son was intitled to the remainder under the limitation? and it was adjudged in the Common Pleas, and that judgment affirmed in King's Bench, that such posthumous son could not take, because he was not born when the particular estate determined. The judgment, it is true, was afterwards reversed in the House of Lords; but it was against the opinion of all the judges, who were much dissatisfied with the reversal; and indeed an act of parliament was thought necessary to take such cases as that out of the old law, by which it was enacted, that *where any estate is settled in remainder to children, with remainder over, any posthumous child may take in the same manner as if born in the father's lifetime.*

So if a lease for life be made with remainder to the right heirs of *J. S.* this remainder will never vest if tenant for life die before *J. S.*; for in that case the particular estate determines before the contingency comes to pass on which the remainder is limited to take effect, *i. e.* the death of *J. S.*; for *nemo est hæres viventis.*

But although no interval is admitted between the determination of the particular estate and the vesting

vesting of the remainder, yet a remainder may be so limited, as not to vest until the very instant in which the particular estate determines.

1 Inst. 298. a. As if an estate be limited to *B.* during the life of *A.* remainder to the heirs of the body of *A.* this is good, though such remainder cannot vest till the very instant in which the particular estate

1 Inst. 378. b. determines. So if land be given to *A.* and *B.* during their joint lives, remainder to the right heirs of him who shall die first, this remainder will be good, though it cannot vest before the determination of the particular estate, and it is observable, that the heir of that one of them who dies first shall have the land by descent, in conformity to the rule before treated of, where the ancestor takes a freehold with a subsequent limitation to his heirs in the same conveyance.

Upon the principle here laid down, that a contingent remainder must vest by the time the preceding estate determines, it follows, that an estate limited on a contingency may fail as to one part, and take effect as to another, wherever the preceding estate is in divers in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it. As in the case of *Lane* and *Pannel*, which as to the present point was in effect as follows: Feme covert and a stranger, being joint tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme, the stranger surrendered his moiety to the baron and feme, and afterwards the baron surrendered the whole to *B.* the feme died, leaving issue, and afterwards the baron died; the question was, Whether the remainder to the heirs of the body of the baron and feme vested in the issue? and it was adjudged

1 Roll. Rep.
238. 317.
438.

judged, that when the stranger conveyed his moiety to the baron, the jointure between the stranger and feme covert was severed, and when the baron afterwards conveyed the whole to *B.* *B.* took an estate in one moiety for the life of the feme (defeasible by her on the death of her husband) and in the other moiety for the life of the stranger; therefore upon the death of the feme the estate in the first moiety was determined, at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be heir of the bodies of both baron and feme; but that was impossible during the life of the baron (for *nemo est hæres viventis*); and therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all as to that moiety. In this case it appears that the remainder failed as to one moiety only.

So likewise a contingent remainder may vest in some, and not in all the persons to whom it was limited; accordingly, as some may come *in esse* before the determination of the preceding estate, and others not. As if a limitation be to *A.* for life, remainder to the use of the right heirs of *J.* and of *K.* here if *J.* happen to die before *A.* and *K.* to survive *A.* the heirs of the first may take, but those of the latter will be forever excluded. Comb. 467.

But where a contingent remainder is limited to the use of several, who do not all become capable at the same time, yet notwithstanding it vests in the person first becoming capable, yet shall it divest as to the proportions of the persons afterwards becoming capable before the determination of the preceding estate, and vest in them
E respectively.

Comb. 467.
Matthews v.
Temple.

respectively. As where a conveyance was to the use of *A.* the husband for life, remainder to *B.* the wife for life, remainder to all the issues-female of their two bodies, and the heirs-male of the bodies of such issues-female; *A.* and *B.* had issue a daughter; and it was resolved, that the remainder in tail to the issues-female was not so attached in that daughter, as not to be devested for a moiety by an after-born daughter; for such a limitation, being by way of use, springs out of the estate according to the capacity of the person in whom it is to rest.

Ibid.

So if there be a limitation to *A.* for life, remainder to the use of the right heirs of *B.* and *C.* though *B.* should die before *C.* yet the heirs of *C.* shall take, if he die before *A.* and the heirs of *B.* and of *C.* will be joint-tenants of the freehold and tenants in common of the inheritance. So it is of a future use limited to two,

Bac. on Uses,
351.

where one becomes capable before the other. As if I make a feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I afterwards marry, my wife will take the whole use; and if I afterwards have a son, he will then take jointly with my wife.

For this vide
2 Salk. 577.
2 Lev. 39.

Lastly, I shall here observe, that if there be no particular estate *in esse*, nor any present right of entry, when the contingency happens, altho' the particular estate be afterwards replaced and restored, yet will the remainder never arise.

How Contingent Remainders are destroyed or prevented ta- king Effect.

IT has been already shewn, that every remain-
der must vest either during the existence of
the particular estate (*in esse* or *in right of entry*), or
at the very instant of its determination, otherwise
it will never take effect at all. Consequently,
every such determination of the preceding estate
before the contingency happen, as leaves no
right of entry, must effectually destroy the con-
tingent remainder. I shall first instance some
cases wherein the determination of the preceding
estate ariseth by the feoffment, forfeiture, sur-
render, or other act of the particular tenant,
and afterwards consider those cases wherein the
preceding estate is merged by descent of the in-
heritance on the particular tenant; for where the
inheritance comes by descent on the particular
estate, we shall find some exceptions to the gene-
rality of the preceding conclusion.

Where lands were devised to *A.* for life, and
after to the next heir-male of *A.* and the heirs-
male of the body of such heir-male; *A.* having
issue a son, made a feoffment to *B.* upon whom
the son entered, and it was adjudged that this
was a contingent remainder to the son of *A.* and
therefore was destroyed by the feoffment of *A.*
who was but tenant for life; for that every
remainder must vest either during the particular
estate, or *eo instanti* that the particular estate

1 Rep. 66.
Archer's case.

determines : in this case the particular estate was determined by the feoffment of *A.* and, since the remainder could not then vest, for *nemo est heres viventis*, it could never afterwards arise.

2 Lev. 39.
Purfoy v.
Rogers.

So where feme covert was tenant for life, with remainder to her first and other sons in tail-male successively, and before the birth of any son, the reversion in fee was conveyed to the husband and wife by fine ; a son was afterwards born, the feme died, and the court held, that although, if the feme had survived her husband, she might have waived and avoided the estate taken by the fine, yet the contingent remainder to the son was utterly destroyed, he not being *in esse* when the particular estate determined, and the possibility which the wife had of rejecting the inheritance given by the fine, and thereby reviving the particular estate for life, would not preserve it. So where there was tenant for life, with remainder to his first and other sons, remainder to

2 Salk. 427.
576. 618.
Thompson v.
Lesch.
2 Vent. 198.

B. in tail, tenant for life, before the birth of any son, surrendered to *B.* the son was afterwards born, and the court held, that the surrender, if good, would have barred the contingent remainder ; but the surrender was adjudged void, because it afterwards appeared, that the surrenderor was *non compos* at the time of the surrender.

Vid. *infra* last
page.

1 Rep 120.
Chudleigh's
case.

The same rule holds whether the remainder be limited at common law or by way of use. As where *A.* having issue *B.* and *C.* his sons made a feoffment to the use of feoffees and their heirs during the life of *B.* in tail-male, remainder to the use of *C.* in tail-male, remainder to his own right heirs ; *A.* died, the feoffees enfeoffed *B.* in fee without consideration, and with notice of the said uses ; afterwards *B.* had a son, and the

the question was, Whether the contingent remainder to him was barred by the feoffment? and it was adjudged, upon solemn argument in the Exchequer-chamber, that there being no son of *B.* to take when the particular estate determined by the feoffment, (which was a forfeiture), the son could never after take; for that a remainder in *use* ought to vest during the particular estate, or at least *eo instanti* it determines, as well as a remainder at common law. So if one make a Cro. Ja. 168. feoffment in fee, or covenant to stand seised to the use of himself for life, and afterwards to the use of his first son in tail-male, and before the birth of any son, make a feoffment in fee, such feoffment will destroy the contingent remainder to the son. Bell's case cited.

It is generally held, that any alteration in the nature of the preceding estate before a remainder vests, will destroy that remainder. As 4 Leon. 36. if lands be given to *A.* in tail, and if *J. S.* come to *Westminster* hall such a day, remainder to *J. S.* in fee, (it is said) that if the lands descend to two coparceners who make partition, the fee shall not accrue to *J. S.* though he should come to *Westminster* hall at the day. And it is also Ibid. said, that if lands be given to *A.* and *B.* for the life of *C.* remainder to the right heirs of the survivor of *A.* and *B.* and *A.* release to *B.* the remainder is destroyed. But notwithstanding these authorities, I conceive, that the alteration in the particular estate, which will destroy a contingent remainder, must amount to an alteration in its *quantity*, and not merely in its *quality*. This opinion, I think, is warranted by two adjudged cases. The first is that of *Lane* and *Pannel* 1 Roll. Rep. before cited, where it appears, that the severance of the jointure between two joint-tenants 238. 317. 438.

for life did not destroy the contingent remainder limited after their joint estate; for there it is adjudged, that because the remainder could not vest at the death of one of them (after the severance of the jointure), such remainder was gone as to one moiety of the lands: now this judgment was idle and mistaken, if the severance itself destroyed the remainder as to the whole.

Raym. 413.

Harrison v.

Belsey.

8 Rep. 76. b.

In the other case it was adjudged, that the release of one joint-tenant to the other did not destroy the contingent remainder depending on their joint estate. It is true, that if a lease be made to two with a condition to have fee, if they make a partition of the term, the condition is destroyed; but that turns upon a reason which does not at all affect a contingent remainder, *viz.* the requisite agreement in quality between the first estate and the enlargement to accrue thereupon: the enlargement must accrue in the same quality in which the estate was first granted; for that was the quality of the estate conditioned to be enlarged, and it must not differ in quality at the time of enlargement from the estate enlarged, otherwise, instead of being an enlargement or extension of the estate then in being, it would only be the accession of another estate of different quality, which would not be agreeable to the terms of the condition. But no such necessary connection exists, or can be supposed to exist, between a remainder and the quality of the preceding estate. Whilst the particular estate continues the same in quantity, it continues to be the same estate as far as respects its relation to a remainder. If a release or severance between joint-tenants destroy the old estate, then a vested remainder man would be intitled to enter immediately upon such release

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or severance; but if, notwithstanding such release or severance, it continues to be the same particular estate as to a vested remainder, why does it not as to a contingent one? No legal modification or alteration in the circumstances only of a particular estate can be said to determine that estate: but the determination of the particular estate is the only point of connection between such estate and the remainder, therefore, until that point is passed, there still remains the same place for a contingent remainder to take effect.

It is said by Lord Chief Justice *Hale*, in the 2 Saund, case of *Puresoy and Rogers*, that in all cases where ^{386.} the particular estate is merged in the reversion, there the contingent remainder is gone, though there be no divesting of any estate. As if there ^{Ibid.} be tenant for life, remainder in tail in *contingency*, remainder in tail *in esse*, if the tenant for life, and he in remainder in tail *in esse*, levy a fine, this is no discontinuance nor divesting of any estate, because each gives such estate as he has, and yet the mean contingent remainder is destroyed.

Exceptions, however, to the universality of this rule are admitted. Wherever the particular estate and reversion meet by the act of the parties only, I believe the contingent remainder is always destroyed, as in the case of *Puresoy and Rogers* ^{2 Lev. 39.} before cited, where feme covert was tenant for life, with remainder to her first and other sons in tail-male successively, and before the birth of any son, the reversion in fee was conveyed to the husband and wife by fine; a son was afterwards born, the feme died, and the court adjudged, that the contingent remainder to the son was destroyed by the merger of the wife's estate in

the reversion. But our books apparently differ with respect to the destruction of the contingent remainder in cases where the inheritance becomes united to the particular estate by descent. Thus in the case of *Plunkett* and *Holmes*, it was resolved, that the descent of the fee on tenant for life did not destroy the contingent remainder. The case was this; one devised lands to *T.* his eldest son, for life, and if *T.* should die without issue living at his death, then to *L.* another of the testator's sons in fee; but if *T.* should have issue living at his death, then to the right heirs of *T.* for ever; the testator died, and it was resolved, that *T.* was tenant for life, with the remainder in fee in contingency, and that the descent of the fee upon him, as heir at the death of his father, did not destroy the contingent remainder. So in the case of *Boothby* and *Vernon*, it was taken for granted, that the contingency was not destroyed by the descent of the fee; *A.* devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue-male of her body living at the time of her death, then to such issue-male, and his heirs-male for ever; but if she should leave no issue-male at her death, then to *G.* and his heirs for ever. The question respected the title of the testator's sister's husband, to be tenant by the courtesy of the lands so devised to her, and the court held, that the inheritance was never executed in possession in the sister during her life, (notwithstanding the inheritance descended on her), and therefore her husband could not be tenant by the courtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency. The same point appears in *Archer's* case, where, notwithstanding the reversion in fee must have

1 Lev. 11.

2 Mod. 147.

3 Rep. 66.

have descended on *Robert*, upon the death of his father, yet he was adjudged to be but tenant for life, with contingent remainder to his next heir-male.

On the other hand, in the case of *Wood and Cro. Jac. Ingersole*, it is said to have been resolved, that 260. the descent of the fee on tenant for life destroyed the contingent remainder; three distinct parcels of land were severally devised by the testator to his three sons, and that if either of them should die, the *other surviving should be his heir*, the eldest son died, and the reporter says, it was adjudged, that the fee descending on the eldest son at the father's death had merged the freehold devised to him, and destroyed the contingent remainder. But there appears to have been a notable mistake in this report; for the words 1 Buller. 61. on the roll are, *and if any of my sons die, the one in the same to be the other's heir*; which words were adjudged case. T. Jones, 79. void for uncertainty, and consequently the above Pollex. 481. point did not come into question. in the case of

Fortescue v. Abbot.

But in the case of *Kent and Harpool*, which T. Jones, 76, as to the point in question, was this: *A.* the 77. father, being tenant for life, remainder to his 1 Vent. 306. son *B.* for life, remainder to the first son of *B.* remainder to the heirs of the body of *A.*, *A.* died before any son was born to *B.* the court held the contingent remainder to the first son of *B.* was destroyed by the descent of the estate-tail on *B.* Of the same opinion was Lord Hard-Rep. Temp.wicke, in the case of *Hooker and Hooker*, where Hardw. 13. lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to his daughters in

in tail, remainder to *A.* in fee; *A.* and his wife died in the lifetime of *B.* who afterwards died without issue, leaving a wife; the question was, Whether the wife of *B.* was intitled to dower in the lands? and it was decreed she was; and Lord Chancellor, with one of the Judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

The seeming differences, which are observable in the opinions of the courts in the above cases, may (as I apprehend) be very easily reconciled, by taking a distinction between those cases wherein an inheritance, out of which a contingent remainder is limited by a will, descends from the person who made the will, and the other cases wherein the inheritance descends clear of those circumstances. Wherever a testator limits a contingent remainder, it is agreed, that the inheritance descends to the heir only till the contingency happens; if so, nothing can be more absurd than to make such descent destroy the contingency. The will does not operate till the testator's death; the descent takes effect at the same time; so that, under such a construction, the particular estate given to the heir by the will arises and is destroyed in one and the same instant; and how is it destroyed? by the descent which that very same will permitted. This would be making a will and no will at the same time, and would amount to this, that a limitation of a particular estate in a will to a testator's heir at law, with a contingent remainder after it, must be void in its creation, as being incapable of ever taking effect.

But where the particular estate and remainder are created by any other means than the will of the

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the person from whom the inheritance descends, there is no such inconsistency in supposing the contingency to be destroyed by the descent; for in those cases the particular estate is created and takes effect with a capacity of being afterwards destroyed by those accidents to which its nature is subject, such as forfeiture, merger, &c. its destruction is not necessarily involved in the mode of its creation, as it must be in the former case, under the construction I have been speaking of; for there the particular estate cannot possibly take effect at all; its existence and destruction commence together, in direct contradiction to the general construction of wills, which is to give effect to the testator's intent, if it may be done without violating any rule of law; and surely when a testator limits a particular estate with a contingent remainder after it, and the law supposes the inheritance to descend to the heir, only till the contingency happens, there can be no violation of the law in considering such descent as a conditional imperfect descent, which has not the same force and effect as a perfect absolute descent would have.

I shall conclude this tract of contingent remainders with taking notice of two or three circumstances relating to them, which could not so properly be brought in under either of the foregoing heads. First, it is to be observed, that where a remainder is devised in contingency, the fee in the mean time descends unto the heir till the contingency happens. As where *A.* devised lands to *B.* his eldest son, for life, and if *B.* should die without issue living at his death, that then the same should remain to *C.* in fee; but if *B.* should have issue living at his death, then the fee should remain to the right heirs of *B.* it was resolved

2 Saund. 380.

Purefoy v.

Rogers.

Raym. 28.

Plunkett and

Holmes.

resolved that *B.* took an estate for life with remainder in fee in contingency, and it was agreed that the fee descended to *B.* as heir till the contingency happened. So where *A.* devised to *C.* for life, and in case *C.* should have issue-male, then to such issue-male and his heirs for ever, and after the death of *C.* in case he should leave no issue-male, then to *D.* and *E.* Lord Chancellor *Parker* was clearly of opinion, that the fee descended to the heir at law of *A.* till the contingency of *B.*'s dying with or without issue-male was determined.

1 P. W. 517.
Carter v. Bar-
a rdiston.

Moor 554.
pl. 750.
3 P. W. 372.
Vick v. Ed-
wards.
Pollex. 54.
Weale v.
Lower.

Secondly, a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency. As where *A.* made a feoffment to the use of himself for life, and after the death of himself and *M.* his wife, to the use of *B.* (his eldest son) for life, and after the death of *A.* *M.* and *B.* to the use of *B.* and the heirs-male of his body, and for default of such issue, to the use of the heirs of *B.* *B.* had issue a daughter, and then by fine and indenture granted to *D.* for 500 years, to commence after the death of *A.* *B.* died, *M.* died, *A.* survived, it was adjudged the estate limited to *B.* was a contingent remainder; for the particular estate was only for the life of *A.* whereas *B.*'s estate was not to commence till after the death of *A.* and *M.* and though *B.* levied the fine for five hundred years, and died before the contingency happened, yet his heir afterwards, when the contingency happened, was bound by the fine, and the lease for five hundred years to *D.* took place; for it was agreed that the contingent remainder descended to his heir, that the fine operated at the beginning by conclusion, and passed no interest,

terest, yet the estoppel should bind the heir, that upon the contingency the estate by estoppel became an estate in interest of the same effect as if the contingency had happened before the fine was levied, that if the fine had been in fee it would have barred the heir, and operated to the benefit of the possession as the fine of a disseisee to a stranger; but being only for years, the fee was vested, and the term good, being drawn out of the fee.

Lastly, I shall observe that a future use as well as a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens, this appears in the preceding case. So where *A.* seised of the manor of *S.* covenanted with another, that when *J. S.* should enfeoff him with the manor of *D.* that he would stand seised of the manor of *S.* to the covenantee and his heirs. The covenantee died, *J. S.* enfeoffed the covenantor, and the heir of the covenantee was adjudged to be in, in course and nature of a descent.

Pollex. 54.

Weale and Lower.

1 Rep. 99. a.
Wood's Case
there cited.

An executory Devise defined, and its several Kinds distinguished.

AN executory devise is defined to be a devise of a future interest in lands not to take effect at the testator's death, but limited to arise and vest upon some future contingency. — This

1 Eq. Abr.

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is the definition commonly given of an executory devise. It may comprehend every species of an executory devise; but at the same time it is not confined to executory devises only, it includes every kind of contingent interest in lands given by devise, (for every contingent interest must necessarily be future), now every contingent interest in lands limited by devise is not an executory devise, for some contingent interests by devise are contingent remainders, therefore such a definition must be considered as defective in point of precision and accuracy.

An executory devise is strictly such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory *bequest*) as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void, for wherever a future interest is so limited by devise as to fall within the rules above laid down for the limitation of contingent remainders, such an interest is not an executory devise but a contingent remainder.—As where a testator devised to his wife for life, and to her son after the death of his mother if she should have a son, and if he should die within age then to the right heirs of the devisor; the testator died without issue, his wife married again, then the heir of the devisor conveyed the reversion to the husband and wife who had afterwards a son born, it was adjudged that the estate limited to that son should not enure by way of executory devise, because that is never allowed where a contingency is limited to depend on a freehold capable to support

Carth. 310.

Reeve v.

Long.

4 Mod. 258.

4 Mod. 284.

Purefoy. v.

Rogers.

2 Saund. 380.

port it; here the mother had a preceding freehold in herself, therefore it was adjudged a contingent remainder in her son; and the heir at law, having a reversion in fee in him by descent, it was held that the remainder was destroyed by his conveying the reversion to the particular estate of the mother before the son was born.

But where a future interest without a preceding estate or a contingent interest unsupported by any preceding freehold is limited by devise, such a limitation, as it cannot be good as a remainder, shall take effect as an executory devise, provided it falls within the limits which the law prescribes for the limitation of such executory estates.—As if one devise to the heir of *J. S.* after the death of *J. S.* it is good as an executory devise.—So where *A.* devised lands to *B.* in fee, to commence and take effect 6 months after the testator's death, it was a good executory devise.—So where testator devised to trustees for 500 years in trust to pay an annuity to *T.* his eldest son for life, remainder to the eldest son of *T.* (who had no son at the testator's death), it was held good by way of executory devise. In the first two of these cases we observe there was no preceding estate, and in the latter case no preceding freehold.

Executory devises are distinguished into three kinds. The first sort is where the deviser departs with his whole fee simple; but upon some contingency qualifies that disposition, and limits an estate on that contingency.—As where a testator devised lands to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should within three months after the wife's death pay 500*l.* to *C.* his executors, &c. then

Per Cur.
1 Salk. 226.

1 Lut. 798.
Clark v.
Smith.

2 P. W. 28,
Gore v. Gore.

1 Salk. 229.

10 Mod. 420.

Marks v.

Marks.

then he devised the lands to *D.* and his heirs, this was an executory devise to *D.*

The second sort of executory devises is where the devisor gives a future estate to arise either upon a contingency or at a time certain; but does not depart with the fee at present or limit any immediate freehold, as a devise to the heir of *J. S.* when he shall have one. — So where one devised lands to *J. S.* for five years from *Michaelmas* then next ensuing, remainder to *B.* in fee, it was adjudged good as an executory devise to *B.* — So where one devised lands to his wife till his son should come to his age of 21 years, and then that his son should have the land to him and his heirs, and if he should die without issue before his said age, then to his daughter, this was a good executory devise to his daughter.

Dyer 74.
pl. 18.
1 *Roll's Abr.*
610. pl. 4.

Brook Devise,
pl. 13.
Cro. Car. 346.

8 *Rep.* 94.
Math. Man-
ning's case.

The third sort is where a term for years or any personal estate is devised to one for life, with remainder over, such a limitation was void at common law, and the whole property vested in the person to whom it was limited for life. There was a distinction indeed taken between a devise (or rather bequest) of the use of a personal thing, and of the thing itself; thus where a devise was that *A.* should use such a book for his life, and afterwards that *B.* should use it, the devise over was agreed to be good; but if the first devise had been of the book itself to one for life, and after to another, then the devise over had been void. But the law is now settled that such limitations over in a will, or by way of trust, are good. As where a term of years was devised to *B.* after the death of *C.* and that *C.* should have it during his life, it was adjudged that this was a good
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executory devise to *B.* of as much of the term as should remain unexpired at the death of *C.*—

So where lessee for 500 years devised his term to his father for life, remainder to his sister and the heirs of her body, it was resolved that this executory devise over to his sister was good.—So

10 Rep. 46.
Lampet's
Case.

where *A.* devised his household goods to his wife for life, and after her death to his son, it was decreed a good devise over to his son.—So a devise of 500*l.* to the testator's daughter, and if she should die under 30 years of age, and unmarried, then to be divided between three; she died before the time, and it was resolved that the money should be divided accordingly.

1 P. W. 1.
Hyde v. Per-
rot.

2 Freem. 206.

The several Properties of Executory Devises.

HAVING shewn the distinction between the limitation of a contingent remainder and an executory devise, and given some instances of the several sorts of executory devises, I shall proceed to treat more particularly of the essential difference between the natures of those two estates, and to consider the bounds or restrictions within which the law confines the limitations of such devises.

A contingent remainder (we have seen) may be limited in conveyances at common law; it relates only to lands and tenements or hereditaments real, it requires a freehold to precede and

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support it, and must vest at furthest at the instant the preceding estate determines.

An executory devise is admitted only in last wills and testaments; it requires no preceding estate to support it, and if there be any preceding estate, it is not necessary that the executory devise should vest when such preceding estate determines. But these are distinctions in the modes of their creation, rather than in the natures of the estates when created.

The great and essential difference between the nature of a contingent remainder and an executory devise, (and that indeed which renders it material to distinguish the one from the other in their creation), consists in this, That the first may be barred and destroyed or prevented from taking effect by several different means, as I have already shewn: Whereas an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited. As where a man devised lands to his son *T.* and his heirs, and if *T.* should die without issue, *living W.* his brother, then *W.* should have those lands to him and his heirs, it was adjudged that *T.* took a fee, and that the limitation to *W.* was a good executory devise to take effect on the contingency of *T.*'s dying in the lifetime of *W.* without issue, and that the recovery of *T.* did not bar this executory interest to *W.* But it is said in that case, if the person to whom the executory devise is limited come in as vouchee in a common recovery, that his possibility is thereby given up and his heir barred.

This privilege of executory devises against being barred or destroyed is the foundation of
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Cro Jac. 590.
Pell's v.
Brown.

an invariable rule with respect to the contingency upon which an estate of this sort is permitted to take effect; which is, that such contingency must happen within a short space of time, such as a life in being or some few years after, otherwise it would be in a testator's power to limit an estate unalienable for generations to come, a power which the law very wisely denies to every man, as the exertion of it would tend to render property in great measure useless to the general purposes and calls of a commercial society. For every executory devise, so far as it goes, creates a perpetuity, that is, an estate unalienable till the contingency be determined one way or another. Upon this principle, although a devise to *A. and his heirs*, and if he die without an heir, that *B.* shall have it, is not good because of the remoteness of such contingency, which may not happen for several generations; yet a devise to *A. and his heirs*, and if *J. S.* die, *living A.* that *B.* shall have it, is good, for this is a contingency confined to the period of a life in being. — So where a man devised land to *A.* and his heirs, provided that if he should die *within age*, that then the land should remain to *B.* and his heirs, it was a good executory devise. I must observe here, that in respect to estates of freehold by the *time of vesting*, I mean the time of *vesting of the freehold*, for although land should be limited for a term of 200 years or upwards, with remainder to an unborn son of a person then living, this executory devise to such unborn son would be good, because the vesting of the freehold is confined to the period of a life then in being, for upon the birth of such son the freehold will vest in him, or upon the death of such person without any son, it must vest somewhere else, (only subject

2 P. W. 28
Gore v. Gore.

in either case to the preceding term.) As where *A.* having two sons, *B.* and *C.* devised his lands to trustees for 500 years upon trusts, and after the determination of that term to the first son, &c. of *B.* (who had no son born at the testator's death) this executory devise to the unborn son of *B.* was held good, because it was clear the freehold must vest either on the birth of such son or on *B.*'s death without having had any son.

Prece. Chanc.
67 Fairfax
and Heron.

If one devise all his lands after the death of his executors to *A.* and his heirs for ever, but if *A.* should die *leaving* no son, then to *B.* this is a good executory devise to *B.* because the contingency is confined to the period of a life. In all the forgoing instances we may observe the contingency was confined to the compass of a life in being, and it is just the same thing if the executory devise be limited to take effect within the compass of several lives in being, for whatever may be the number of such lives, the whole period can amount to no more than the life of the survivor of them.

Vid. 1 Salk.
229.

10 Mod. 420.
Marks v.
Marks.

So likewise an executory devise to vest within a short time after the period of a life in being is good. As where a testator devised to his wife for life, remainder to *C.* his second son in fee, provided if *D.* his third son should, within three months after his wife's death, pay 500*l.* to *C.* his executors, &c. then he devised the same lands to *D.* and his heirs, and it was adjudged a good executory devise to *D.* The courts indeed have gone so far as to admit of executory devises limited to vest within the compass of 21 years, after the period of a life in being. As where the testator devised lands to his grandson *W.* and his heirs, and if *W.* should die under age, then

to his grandson *T.* and if *T.* should die under age, then to such other son of the body of his daughter *M. S.* by his son-in-law *T. S.* as should happen to attain his age of 21 years, remainder over. Testator died leaving two grandsons *W.* and *T.* who both died under age, afterwards another son *T.* of the body of *M. S.* by *T. S.* was born, and it was decreed a good executory devise to this after son *T.* if he should attain his age of 21 years; for the Judges in certifying their opinion upon that case observed, that the power of alienation was not thereby restrained longer than the law would otherwise restrain it, that is, during the minority of the grandson who was to take it, which could not reasonably be said to extend to a perpetuity. For we have already seen that an estate may be limited not to vest till the end of a life in being, and then, should it vest in an infant, that infant cannot by law dispose of it before his age of 21 years.

In the preceding case, the limitation was not confined to vest in the life either of *M. S.* or *T. S.* for they might both die leaving a son quite an infant; but it was confined to vest at the infant's age of 21, which must necessarily happen within 21 years after the death of its mother *M. S.* who was then in being. The same point was adjudged in the case of *Taylor and Biddal*, where a man having only one sister and heir, who had issue *A.* and afterwards married *B.* by whom she had issue *C.* and *D.* devised lands to his sister until *C.* should attain 21, and after *C.* should have attained that age, to *C.* and his heirs; and if *C.* should die before 21, then to the heirs of the body of *B.* and their heirs, as they should attain their respective ages of 21. Testator died, *C.* died before 21, living *B. D.* (either as heir of *C.* in whom

Caf. Temp.
Talb. 228.
Stephens v.
Stephens.

3 Mod. 289.
1 Equit. Abr.
188. c. 11. 2

Caf. Temp.
Talb. 245.
Sabberton v.
Sabbertors.
Vid. same
point.
3 P. W. 326.
Green v.
Ekins.
2 P. W. 421.
Maddox v.
Staines.

whom the fee was vested) or as *heir of the body* of *B.* being of age after the death of *B.* took the estate by way of executory devise. Here we see the heir of the body of *B.* could not take till after the death of *B.* for *nemo est hæres viventis*, and since that heir of the body of *B.* who should attain 21, might not have been born before his father's death, and the estate could not vest in him till his age of 21, it is evident the estate might possibly not have vested by that limitation, till 21 years after the period of a life then in being.— So where a personal estate was limited by the testator to such of his brother's children then unborn as should attain their ages of 21, it was adjudged a good executory devise.

So that the law seems to be now settled, that an executory devise either of a real or personal estate, which must, in the nature of the limitation, vest within 21 years after the period of a life in being is good, and this appears to be the longest period yet allowed for the vesting of such estates.

3 Leon. 111.

But wherever an executory devise is limited to take effect after a *dying without heirs* or *without issue*, the limitation over is void, for the policy of our law will not suffer property to be tied up, and rendered unalienable in expectation of such remote contingencies. So if lands be devised to *A.* and his *heirs*, and if *A.* die *without heir* then to *B.* this limitation to *B.* is absolutely void.— So where *A.* having the reversion in fee of lands, (which upon the marriage of his son *B.* he had settled on himself for life, remainder to *B.* for 99 years, remainder to trustees for the life of *B.* remainder to the first and other sons of *B.* successively in tail-male, remainder to the heirs

Caf. Temp.
Talb. 262.
Lady Lanef-
borough v.
Fox.

heirs-male of the body of *B.*) devised all the lands in that settlement, *on failure of issue of the body of B. and for want of heirs-male of his own body* to his daughter *F.* and the heirs of her body, this Will did not give an estate-tail by implication to *B.* and the devise to *F.* was executory and void, as being on too remote a contingency. But if in this case *B.* had by the settlement been tenant in tail, and there had been a remainder to *A.* in tail-male, with reversion to him in fee, then I apprehend the above devise to his daughter *F.* would have been a good immediate devise out of his reversion expectant on the estate-tail in himself.

For the court agreed in the case of *Balger v. Leyd*, that if a man seised in fee devise his lands to *A.* if *J. S. a stranger die without issue*, that this is an executory devise, because there is no particular estate to support it, and therefore it is void as being too remote; but that if a man, seised of the reversion after an estate-tail, devise the lands to another *after failure of issue of tenant in tail*, it is an immediate devise of the reversion expectant on the estate-tail. — So in the preceding case, because there was no estate-tail in *B.* or in *A.* the devise of lands upon failure of issue of the one, and of heirs-male of the body of the other, was a devise of a future interest not dependent on any preceding estate; whereas if the first had been tenant in tail, with remainder to the other in tail-male, then would such a devise have been no more than the devise of a present interest, expectant on those estates-tail capable of being barred, and therefore good.

Again, where a man possessed of a term devised it to one, and the heirs male of his body, and for default of such issue to another, and the heirs-

1 Roll. Abr.

610. pl 7.

Palmer 50.

Lewknors

male case.

male of his body, this was adjudged a void remainder, for if it should be suffered a man might make perpetuities of a term.—So where *A.* possessed of a term, devised it to *B.* and the heirs-

1 Roll's Abr. male of his body, remainder to *C.* and the heirs-
611. pl. 1. male of his body, this was a void remainder to
Leventhorp v. *C.*—So where *A.* possessed of a term for 99
Ashby. years, determinable upon three lives, devised the

lease to his wife for life, and after her decease to
1 Ventr. 79. *N.* his son for life, and if *N.* should die without
1 Lev. 290. issue then to *B.* it was held that the remainder to *B.*
Love and was void, for that the remainder of a term could
Windham. not depend on a possibility so remote as the dying
without issue.

1 Roll's Abr. And in these cases where a term is limited to
611. pl. 1. one in tail, it is an absolute and complete dispo-
Leventhorp v. sition of the whole term to him and his execu-
Ashby. tors, and shall not go to his issue, nor revert for
default of issue.

And the same rule holds even where a personal
estate is devised, only in trust for one to receive
the rents and profits to him and the heirs of his
body, as where a testator by his will devised that
1 Vezy 133, 400*l.* should be put out on good security for his
154. son *T.* that he might have the interest of it for
Butterfield v. his life, and for the lawful heirs of his body, and
Butterfield. if it should so happen that he should die without
heirs, it should go to his youngest son *J. B.*
Lord Hardwicke decreed that the whole vested
in the first taker, and the limitation over was too
remote.

It is to be observed, That wherever a term is
devised to one for a day or an hour, it is a devise
of the whole term if the limitation over is void,
and it appear to be the intention of the testator
to dispose of the whole from his executors; but if
such intention do not appear, then a limitation
of

Vid. 1 P. W.
666.

1 Salk 231.
Eyres v.
Faulkland,

of a term to one for life does not vest the whole so absolutely in him as to be at his disposal, but leaves a possibility (*viz.* upon death of devisee within the term) of reverter in the executors of the testator. Thus, where *A.* possessed of a term of 99 years devised his term to *B.* for life, and then to *C.* and so on to five others successively, for life, all seven being dead, upon a question who should have the residue of the term, it was adjudged to revert to the executors of the testator.

But we are to remember that although a devise over after a dying *without heirs* is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made, be collateral heir to the first devisee, in that case the first devisee takes only an estate-tail, because the limitation over to the collateral heir plainly denotes that only heirs of the body could have been intended. As where *A.* devised lands to *B.* and his heirs, and for want of heirs of him, to *D.* it was adjudged an estate-tail only in *B.* for *D.* was a near relation and heir to *B.* and therefore *B.* could not die without heirs so long as *D.* or any of his lineal heirs existed. So where *A.* devised lands to his wife for life, then to his son *H.* for life, remainder to his son *G.* and his heirs for ever, and if he should die *without heirs*, then to his two daughters; this was determined to be an estate-tail in *G.*; for it was impossible he should die without heirs whilst his sisters were living; consequently the testator by *heirs*, could only mean *heirs of the body*. But wherever the remainder, after dying *without heirs*, is limited over to one who is not heir to the first devisee, such after limitation will not alter the preceding positive devise in fee, nor will the courts in that case go so far as to restrain the general

1 Salk. 231.

Eyles v.

Faulkland.

Vide Ja. Cro.

415. Webb

and Herring.

3 Lev. 76.

Parker v.

Thacker.

Cas. Temp.

Talbot. 1.

Tyte v. Willis.

general import of the word *beirs* to that of the words *beirs of the body*. So where the testator devised to his son *and his beirs*, and if he should die *without beirs*, remainder over to another who was half brother to the first devisee, upon a question made, Whether the first limitation was in fee or in tail? Lord *Hardwicke* said, it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.

Again, a devise may be to one and *his beirs*, with an executory devise over, limited to take place on an event which must happen within the compass of a life in being. As where a testator devised to *A.* and his heirs, and if he should die *before twenty-one*, then to *B.* and his heirs; this was a good executory devise to *B.* Upon the same principle, though an executory devise to vest on a dying *without issue generally* is not good, because too remote, yet where the dying without issue is restrained to the period of a life in being, an executory devise thereon limited will be good. As where the testator possessed of a term for years, devised the lands to *B.* and to the heirs of his body, and if *B.* should die without issue, living *C.* then to *C.* the court held this a good limitation to *C.* the contingency being to arise within the compass of a life in being. So where a testator devised his term to his wife for life, and after her death to *R. F.* for life, and after her death to *T. F.* and his children, and if the said *T. F.* should happen to die before the expiration of the said term, not having issue of his body *then living*, then to go over to *D.* for

1 *Vezey*, 89.
Tilburgh v.
Barbut.

Vin. 8. fol.
112. pl. 38.
Gurnel v.
Wood.

Vide Duke of
Norfolk's case,
3 Chanc. Cas.
1. &c.

1 Salk. 225.
Lamb v. Archer.

1 Eq. Abr.
193. Fletcher's case.

for the residue of the term: this limitation to *D.* was decreed good, the contingency being confined to a death without issue *then living*; for though it was contended, that the words *then living* related only to the other words *before the expiration of the term*, yet it was answered, that those words must relate to the time of the death, otherwise there would be no difference between this and the common limitation over of a term if one *die without issue*; for there it must be intended *dying without issue before the expiration of the term*, there being nothing to limit over after the expiration of the term. So it is if the *dying without issue* be confined to the compass of 21 years after the period of a life in being. As ^{2 P. W. 421.} where a testator devised the residue of his personal ^{Maddox v.} estate to his niece *A.* (wife of *B.*) for life, and ^{Stains.} after her death, the yearly produce thereof for the maintenance of *such children* as she should have by the said *B.* until the sons should be 21, and the daughters 18, who were to be paid their portions at such respective ages, and for want of *such issue*, remainder over, it was decreed a good limitation over, as by *such issue* must be meant such children of *A.* and *B.* as should attain the age or ages aforesaid; which contingency must in all events be determined within 21 years after the death of *A.*

Indeed with respect to executory devises of terms for years, or other personal estates, the court of Chancery has very much inclined to lay hold of any words in the will to tie up the generality of the expression of *dying without issue*, and confine it to dying without issue *living* at the time of the parent's decease. As where a ^{3 P. W. 258.} term was devised to *A.* for life, remainder to ^{Atkinson v.} *such children* as the testator should leave at the ^{Hutchinson.} time ^{Vide same} point.

- 1 P. W. 663. time of his death, and if all such children should die without *leaving* any issue, then to *B.* this was a good executory devise to *B.* and the words "Without *leaving* any issue" were understood to mean "*leaving any issue* at the time of their deaths." So when a testator devised a personal estate in trust to be settled on his daughters or *the heirs* of her body, but in case his said daughter should die *leaving* no heirs of her body, then over to others, Lord *Hardwicke* decreed the limitation good upon the contingency of the daughter's dying without issue *living* at her death, as he considered the word *leaving* as relating to that time. So again in another case, the words *and leave no issue* were construed "*leave no issue living* at the time of her death." In the case of *Pinbury* and *Elkin*, where one made his wife executrix, and gave her all his goods and chattels, provided that if she should die *without issue* by the said testator, *then* after her decease, So *l.* should remain to the testator's brother, the words *then after* were taken to mean *immediately after*, and consequently to restrain the dying without issue to the time of the death. So where the testator devised a term to his son *A.* for life, and no longer, and after his decease, to such of the issue of *A.* as *A.* should by will appoint, and in case *A.* should die *without issue*, then he devised the same over, these words upon the whole of the will were construed to mean without issue *living at his death*; for it was to be intended such issue as he should or might appoint the term to, that is, issue *then living*. And it has been held, that where a legacy is given upon this contingency (*scil.*) if *J. S. shall die without issue*, that this shall be taken according to common parlance, (*viz.*) *issue living at his death*; and accordingly in a case of that

1 P. W. 663.
Forth v. Chapman.

2 Atk. 647.
Read v. Snell.

3 Atk. 396.
Lampley v. Bower.

2 P. W. 563.

1 P. W. 432.
Target v. Gaunt.

that sort, where the person on whose death without issue the legacy was to be paid died leaving issue, which issue died six months after without issue, the court held the legacy was not due, the contingency not having happened.

We are to observe, that in all cases where such restrictive circumstances as I have been instancing appear, it matters not whether the term or other personal estate be limited to the first taker *absolutely* or *for life*, or to him and *his heirs* or *issue*; for the restriction will be equally valid under any of those circumstances, and give effect to the limitation over.

A diversity has in some cases been contended for between a limitation of a term, by such words as in the case of a real estate would give an *express* estate-tail, and a limitation of the same by such words, as in the case of a real estate would only give an estate-tail by *implication*, upon this principle, that where the words of a will, if used with regard to a freehold, would give an *express* estate-tail, there the same words applied to a term will pass the whole interest in that term; but that, where the words of the will, if applied to a freehold, would give an estate tail by *implication* only, there they will not enure to give the whole interest in the term; and consequently, that where a term is limited to one, and if he die *without issue*, remainder over, this limitation will not vest the whole term in him, as a limitation to the *heirs of his body* or to *his issue* would do, but are always to be understood restrictively, and to relate only to his dying without issue *living at his death*, and therefore give him the term only during his life. In some instances, it is true, the court seems to have countenanced a distinction of this sort, as appears in *P. W.'s Reports* of some of those

P. W. 198.

Nichols v.

Hooper.

Vid. 2 Atk.

647. Read v.

Snell.

those cases which I have last cited from him; but the decisions in all those cases, as I have before observed, were really grounded on some circumstances in the will which the court caught hold of to confine the generality of the expression, *dying without issue* to *dying without issue then living*. Now if the court had admitted such a distinction as I have mentioned, it would have been needless to have inquired into, or insisted upon those circumstances of restriction upon which, in delivering their opinions, they laid so much stress. Besides, where no such circumstances have appeared, it has been determined, that the limitation of a term over after a *dying without issue* is to be taken in the legal extent of the expression, and therefore the limitation over being (in that sense) too remote, is utterly void, and the whole term, or other personal estate, vests absolutely in the first devisee. This appears in the case of *Love* and *Wyndham* before cited. But the same point has been determined more lately by Lord *Hardwicke*, in the case of a devise wherein the testator said, M. D. *I make my sole heir and executrix, and if she die without issue*, then to go to L. B. Lord Chancellor was of opinion, that no authority came up to supporting the point, that *ex vi termini* such a limitation of a personal estate should be confined to a dying without issue *living* at the death of the first taker, and as the limitation was general, and not restrained by any circumstance in the will, the devise over was void.

It has been held, that where the devise of a personal estate is to one *for life* expressly, and if he die *without issue*, remainder over, that such remainder is good, because the express estate for life shall not be enlarged by mere words of *implication*.

1 Lev. 290.

2 Atk. 308.

Beauclerk v.
Dormer.

1 Eq. Abz.
362. pl. 12.
Cas. Temp.
Talbot, 21.

plication. But the law as to this point seems now to be settled otherwise, and that whether the term or personal estate be limited to one, and if he die without issue, remainder over, or to one *for life*, and if he die without issue, remainder over, it is exactly the same thing; and that in either case the whole vests in the first taker, if there be no other restrictive clause to confine it to a dying without issue *then living*. Vide Lev. 290. Love v. Windham. 2 Atk. 647. Read v. Snell.

We have seen, that in respect to limitations of real estates, where an estate for life is given to the ancestor, followed by a limitation to his heirs general or special, the subsequent limitation vests in the ancestor, and the heir takes by *descent* and not by *purchase*. But in the limitation of personal estates, a similar rule does not always hold; if a term be devised to one *for life*, and afterwards to the *heirs of his body*, these words are generally words of *limitation*, and the whole vests in the first taker: but if there appears any other circumstance or clause in the will to shew the intention that these words should be words of *purchase*, and not of *limitation*, then will the ancestor take for life only, and his heir will take by *purchase*. Here I must observe, that an executory devise of a term and the limitation of the trust of a term are governed by the same rules. Thus where a term for 900 years was assigned to trustees in *trust*, to permit the husband and wife, and the survivor of them, to receive the profits for so many years as they, or the survivor of them, should happen to live, and after their deaths, to the use of *the heirs of the body* of the wife by the husband to be begotten, it was held, that the heir of the body took by *purchase*, and that it did not vest absolutely in the mother who survived, so as to go to her administrator. 1 Vern. 234. 2 Vern. 43. 195. Peacock and Spooner. 2 Freem. 114.

ministrator. This was the decree, and the decree was afterwards affirmed in the House of Lords. The same point was afterwards decreed
 2 Vern. 362. in a similar case of *Dafferne v. Goodman*, which
 2 Freem. 231. latter decree was entirely grounded on the authority of the preceding. It is true no particular expression in either of these cases determined the intent to be, that the heir of the body should take as a purchaser; but these being cases of marriage-settlements, it was reasonably enough inferred, that the issue of the marriage were intended objects of the settlement, and the term not designed to vest wholly in the mother. But afterwards, in a subsequent case of a marriage-settlement, a decree at the rolls, grounded upon the case of *Peacock and Spooner*, was reversed, and the limitation to the heir-male decreed to be void. The case was this: On the marriage of *A.* his grandfather assigned a term for 100 years in trust for *A.* for life, then to *A.*'s wife for life, and after their deaths, for the heirs of the bodies of *A.* and his said wife, the wife died leaving issue, *A.* survived; it was decreed that the whole term vested in *A.* This last case appears to have been the ruling authority ever since in cases of the like nature, and that of
 Vide 2 Vez. *Peacock and Spooner* is only attended to in cases
 660. exactly the same in *specie* with itself, as was that of *Dafferne v. Goodman*, as reported by *Freeman*. But there have been other cases which have proceeded entirely upon circumstances of evidence of the intention. As where a term was settled in trust for one if she should so long live, and after her decease, in trust for her husband if he should so long live, and after his decease, in trust for the heirs of the body of the wife begotten by the husband, and their executors, administrators and assigns,
 Lord

2 Atk. 89.
 Hodgson v.
 Bussey.

Lord *Hardwicke* decreed, that the limitation to *the heirs of the body, &c.* were words of purchase, as he held the addition of the words *executors, administrators and assigns*, strong evidence of the intent to give only an usufructuary interest for life, and to vest the property in the heirs of the body. The like point was decreed in the case of *Read and Snell* before cited, in which case the decision was grounded on the words *leaving no heirs of her body*, which were considered as relative to the time of her death, and therefore restrained the general import of the preceding limitation to the life only of the first taker.

Wherever one limitation of a devise is taken to be executory, all the subsequent limitations must likewise be so taken. This is laid down as a rule by *Serjeant Pemberton* in the case I have cited in the margin; for (says he) the several limitations of a devise of one and the same thing shall never be made to operate several ways (*viz.*) some by way of executory devise, and others by way of remainder. The court seemed to admit the truth of the position; but it may be worth while to consider upon what reasons it is grounded, for questions have arisen (within my knowledge), and cases have been brought to me which turned upon this very point. With respect to the devise of a term, it is clear, that if there be 20 limitations of it after a devise to one for life, &c. every one of the 20 will be equally executory as the first of them; because all are equally limitations of a term after a disposition thereof for life, which cannot hold otherwise than by way of executory devise. Therefore the question can only arise with respect to the devise of a freehold; and there we are to consider, that every executory devise is either the limitation of an

estate after the fee has already been disposed of, or else is a feehold to commence *in futuro*, without any preceding freehold to support it. In the first case it is evident, that every limitation subsequent to the first executory devise must be also executory; because it is also a limitation of an estate after the fee has already been disposed of. In the latter case, the first *executory* limitation, being the first freehold limited by the will, no freehold can vest in possession under that will before the time limited for such first limitation to take effect; if it could, then would that supposed *executory* limitation be really *not executory*, because, it would in that case be supported by a preceding vested freehold. It is true, that with respect to *contingent remainders* a subsequent vested remainder may *vest in interest* before a preceding contingent remainder, as I have before observed when I was treating of contingent remainders; but that is only where some preceding freehold vests *in possession* in the mean time: but no subsequent remainder can first vest in possession, and afterwards a preceding estate take place; for wherever a subsequent remainder vests *in possession* before a preceding contingent one can arise and vest, such preceding one is utterly destroyed, as we have already seen. But in the present case, there is no freehold limited to vest immediately in possession. We cannot make the preceding estate and the remainder change places, and the latter come into possession before the former; this would be absurd, and directly contrary to the order of the limitation. If this cannot be done, then no one of the subsequent limitations can take place before the time limited for the first; they are all therefore equally freeholds to commence *in futuro* without any present preceding

ceding freehold to support them, and consequently are all equally executory till the time comes for the first estate to vest or fail, then all the subsequent limitations may vest, and no longer continue executory. Thus where *A.* having two sons *B.* and *C.* devised lands to trustees for 500 years, upon trust to pay an annuity of 50 *l. per annum* to *B.* for life, and after the determination of that term to the first and other sons of *B.* in tail, remainder to *C.* for life, and *B.* at the testator's death had never had a son born; here it was held that till the event of *B.*'s having a son should be decided one way or the other, by the birth of such son, or by *B.*'s death without one, the freehold descended to the deviser's heir at law. Therefore till the birth of such son or *B.*'s death without one, *C.*'s remainder must have been executory, being a freehold limited to commence *in futuro* without a preceding freehold to support it, for the freehold descending to the heir at law of *A.* was no part of the limitation in the will; but only descended in consequence of its not having been thereby limited, and therefore had no connection with *C.*'s remainder in the light of a preceding estate.

It is to be observed, That where a limitation in a will is made after a preceding executory or contingent limitation, or a devise is limited to take effect on a condition annexed to a preceding contingent estate, if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place, the first estate being considered only as a preceding conditional limitation, and not as a preceding condition to give effect to the subsequent limitation. As where *A.* possessed of a

1 Eq. Abr.

245.

Jones v. West
comb.

Willson 105.

Wickett v.

Gulliver.

1 Salk. 229.

Scatterwood v.

Edge.

Fortescue

184. Roe v.

Fludd.

term for years devised it to his wife for life, and after her death to the child she was then *enseint* with, and if such child should die before the age of 21, then one third part of the said term to his said wife, and the other two thirds to certain other persons, one question was, Whether this devise to the wife was good as the event happened, because the wife was not then *enseint*? and it was held that it was good. So where testator devised to his wife for life, remainder to a child of which she was supposed *enseint* in fee; but if such child should die before 21, leaving no issue remainder *over*, no child was born. It was adjudged that the limitation to the child was a contingent remainder, and the remainder over a good executory devise, which, as the preceding contingent remainder never vested, took effect on the death of the wife.

So where a devise was to trustees for 11 years, remainder to the first and other sons of *B.* successively in tail, provided they should take the testator's surname, and if not, or they should die without issue, remainder to the first son of *C.* *B.* died without having had any issue, *C.* had a son at the time of the devise, the court were not agreed as to the validity of the first devise; but they resolved that the remainder took effect, and that the limitation to the sons of *A.* was not a precedent condition. But where there was a devise to *A.* and his heirs, upon condition that he should pay all the testator's debts and legacies, and if he did not, then to *B.* in fee, *A.* died in the lifetime of testator, this devise to *A.* was a lapsed devise, and it was adjudged that the devise to *B.* being a condition annexed to the first devise, as that was gone, the condition and sub-

subsequent estate depending thereon was also gone.

But the authority of this last case has been over-ruled by the determination in the case of *Avelyn v. Ward*, where *A.* devised his real estate to his brother, *B.* and his heirs, on condition that *B.* should give a release within three months after the testator's death; but if *B.* should neglect to give such release, he devised it to *R.* the first devisee died in the lifetime of the testator, and it was decreed that the devise over should take place, and though a distinction was contended for between the case of a remainder over after an executory particular estate only, and those cases wherein an executory devise was introduced after a disposition of the whole fee, yet Lord *Hardwicke* exploded that distinction, as he did not find (he said) any authority to warrant it; and he thought the case of *Jones v. Westcomb* above cited a strong authority, that the construction ought to be the same, whether it be the case of a remainder limited conditionally after a particular estate, which never takes effect, or whether it be a contingent limitation after a fee.

So in the case of *Hopkins v. Hopkins*, where the first devisee died in the lifetime of the deviser, the contingent remainders over, as they were not vested at the testator's death, were held to enure by way of executory devise. Cas. Temp. Talb. 44.

It has been said indeed, That in cases of executory devises there can be no limitations over, by which is meant that where the whole interest is once limited by way of executory devise, it cannot be again limited over on another contingency: For where the whole interest was not limited in the first executory devise, there could be no doubt as to the validity of a further limitation, 4 Mod. 259.

because there still remained something more to limit.

Pollex. 33.
Backhouse's
case.
Vid. same
point.
1 Mod. 115.
Burgiss's case.

It is true it was formerly held, that wherever the first executory limitation was in such words as would convey the whole interest, there any subsequent limitation was void, notwithstanding the preceding limitation never took effect; as where a term was limited to a man for life, and afterwards to his first and other sons in tail successively, and for default of such issue, remainder over, this remainder was held void, though no son was ever born, because the first limitation to the sons in tail was an executory devise of the whole interest: so that wherever an executory devise would, if it had vested, have carried the whole interest, no limitation over could be good even though the preceding never vested. But these cases have long since been denied to be law, and it seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them may be good in event, provided it be so limited that it must take effect within 21 years after the period of a life then in being, and no one of the preceding executory limitations happen to take effect. But when once any one of such preceding executory limitations happens to take place, that instant all the subsequent limitations become void, and the whole interest is vested. As in the case of *Stephens v. Stephens*, where a devise was in these words, "I give and
" devise unto my grandson *W.* all the lands, &c.
" to him, *his heirs and assigns for ever*, but in
" case my said grandson *W.* shall happen to die
" before he attains the age of 21, then I give
" and bequeath to my grandson *T.* all the said
" lands, &c. to him, *his heirs and assigns for ever*,
" but

Cal. Temp.
Talbot. 228.

" but in case my said grandson T. shall happen
 " to die before he attains 21, then I give all the
 " said lands to such other son of my daughter
 " M. S. by T. S. as shall attain the age of 21,
 " his heirs and assigns for ever, and for default
 " of such issue, then to the daughters of M. S.
 " by T. S. in tail, and for want of such issue,
 " then to Sir R. S. in fee;" in this case it was
 determined by the opinion of the Judges, that
 the estate should vest in the first person who
 should come in being, or live to take under
 the words of any of these limitations, and
 that until one of these limitations should become
 vested, none of the subsequent ones would be
 void, and therefore if no son of the testator's
 daughter M. S. by her husband T. S. should live
 to attain 21 years of age, nor any grand-daughter
 be born to take under those limitations, in that
 case the estate would vest in the remainder man
 Sir R. S. — So where a testator devised a term in
 trust for A. for life, remainder to his first and
 other sons in tail successively, remainder to his
 daughters, and in default of daughters, or in
 case of their deaths before the age of 21, re-
 mainder to B. for the residue of the term. A.
 died without ever having had a son or daughter,
 and it was adjudged that the remainder over to
 B. was good and vested — And where there was
 a limitation of an estate to A. for life, remainder
 to his first and other sons in tail, remainder over,
 with a clause that the plate, furniture, &c. in
 certain mansionhouse should go accordingly as
 his estate was settled, as far as it might by law,
 A. died without issue, and Lord Hardwicke
 argued, that the first contingency never having
 taken place, the limitation of the furniture over
 was good by the event; but without delivering a

P. W. 618.

Stanley v.
Leigh.Barnardist.
ed in Chan.Green v.
Grosvenor.

decisive opinion upon the point, he declared, that in the reason of the thing there seemed to him to be a great difference between such sort of limitations *vested*, and the like limitations when *contingent*; as if a personal estate be bequeathed to *A.* for life, the remainder to *B.* and the heirs-male of his body (supposing *B.* a person *in esse*) remainder to *C.* the whole remainder in that case is vested in *B.* and *C.* can never under that limitation come in for any part of the term, but if the first remainder were contingent in its creation, then the remainder over to *C.* would be good or bad, according to the event of the contingency; that is, if a limitation which would have been a contingent remainder in case of a real estate, should become vested during the life of any of the tenants for life, or if a posthumous child should be born who would have had the benefit of the remainder, if it had been within the statute of *W. III.* then the remainder over would be bad in event; but if no such contingency should happen then it would be good.

Vid. further.

1 Vern. 304.

Massenburg
v. Ash.

2 Salk. 156.

Higgin v.
Derby.

Caf. Tem.

Talb. 245.

Saberton v.

Saberton.

3 P. W. 300.

Studholm v.

Hodgson.

Ibid. 306.

Green v.

Ekins.

Caf. Temp.

Talb. 21.

And though in the case of *Clare v. Clare*, Lord *Talbot* seems to have been of a contrary opinion, yet the case of *Stephens v. Stephens*, determined afterwards by the same Chancellor, upon the certificate of the Judges, and the uniform tenor of subsequent resolutions, the principal of which I have cited in the margin, appear now to have settled the law in that manner.

I have before shewn that whenever a contingent limitation is preceded by a freehold capable of supporting it, it shall be construed a contingent remainder, and not an executory devise; but it is possible that the freehold so limited may, by subsequent accident, become incapable of taking

taking effect at all, (as by the death of the first devisee in the testator's lifetime), in which case the subsequent limitation will be in the same condition at the testator's death, (that is at the time when the will is to take effect) as if it had been limited without any preceding freehold; now in this case it has been held that where such subsequent contingent limitation could not vest at the testator's death, it should enure as an executory devise, rather than fail for want of that preceding freehold which had never taken effect.

As where *A.* devised lands to trustees in trust for *B.* for life, and after his decease for the first and other sons of *B.* successively in tail male, remainder to the future sons of *C.* for life successively with divers mean remainders, remainder over to *D.* *B.* died without issue in the lifetime of the testator, and afterwards the testator died before any of the contingent remainders were vested, the question was, Whether the mean contingent remainders were not become void, there being no preceding estate to support them, for if so then would the whole have been vested in possession in *D.*? and it was held they should enure by way of executory devise; and a son being afterwards born to *C.* it was held that the executory devise having thereby once vested, the subsequent limitations thereupon became contingent remainders, and though such son afterwards died before the next subsequent limitations vested, yet were they not destroyed, because it was held, that the inheritance vested in the trustees was as sufficient to support them, as if there had been estates limited for that particular purpose.

Cal. Temp.
Talb. 44.
Hopkins v.
Hopkins.

1 Vezey 268.
Hopkins v.
Hopkins.

Vid. Carth.
310.

But when a preceding freehold has once vested, no subsequent accident will make a

Long.
4 Mod. 258.
2 Saund. 380.

contingent remainder enure as an executory devise.

1 Salk. 226.
Talbot. 145.
Goodright v.
Cornish.

Ibid. 229.
Scatterwood
v. Edge.

It has been held that where an executory devise is limited, *per verba de presenti*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, there the devisee must be a person capable at the death of the devisee, or otherwise the devise will be void, as if one devise (in the first instance) to the heir of J. S. and J. S. is living at the death of the testator, it is said the devise shall not be construed an executory devise, and therefore must be void; but that if it were to the heir of J. S. after the death of J. S. that would be clearly good as an executory devise, because a future time is mentioned: so it has been held that a devise to the first son of A. having none at that time is void; but if it were to the first son of A. when he shall have one it would be good. I don't find any case determined upon this distinction. For in the two cases I have cited, the judgments did not depend altogether upon that point. In the first the limitation was to A. for 50 years if he should so long live, remainder to the heirs-male of A. the court, upon the distinction I have mentioned, were of opinion that this devise to the heirs-male was not a good executory devise; but whatever it was in its creation they held it became void in event, for A. died without issue, so that whether it was originally void was no direct point of their decision; the same observation may be made with respect to the other case where a limitation was to trustees for 11 years, and then to the first son of B. (then unborn) it was there said upon the same principle, that this limitation should not enure

enure as an executory devise to the first son of *B.* because limited *per verba de presenti*; but, however, since *B.* died without issue, it became void in event whatever it was in its creation, therefore I apprehend the judgment did not decide that point.

It was formerly disputed, Whether a devise to an infant in *ventre sa mere* was good or not? some held that it was not, upon the principle I have been mentioning, whilst others contended that it was: but all agreed, that a devise to an infant when he should be born was good. But the law it seems is now clear, that a devise to an infant in *ventre sa mere* is good enough, though he be born after the testator's death, *per North*.
C. J.

It is a rule, that wherever there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir at law. As where the testator devised lands to *A.* for five years from *Michaelmas* then next, remainder to *B.* in fee, and died before *Michaelmas*, it was held that the freehold and fee-simple descended to the heir at law till *Michaelmas*. So where *A.* seised in fee, devised to *B.* in fee, to commence six months after *A.*'s death, during those six months the estate descended and continued in the heir at law. And where a testator seised in fee devised to trustees for 500 years, remainder to the first and other sons of *B.* in tail, (and *B.* had no son born at the testator's death), remainder over in fee, it was held, that the freehold descended to the heir at law till the birth of a son to *B.* or till his death, without having had a son.

So where there is a preceding estate limited with an executory devise over of the real estate,
the

Vid. also Cal.

Temp. Talb.

145. Chap-

man v. Blisset.

1 Lev. 135.

Snow v. Cut-

ler.

1 Freem. 293.

2 Freem. 248.

Taylor v.

Biddal.

Cro. El. 878.

Pay's case.

1 Lutw. 313.

Clerk v.

Smith.

2 P. W. 28.

Gore v. Gore.

Caf. Temp.
Tal. 44.
Hopkins v.
Hopkins.

1 Vez. 268.
Hopkins v.
Hopkins.

the intermediate profits between the determination of the first estate and the vesting of the limitation over will go to the heir at law, if not otherwise disposed of. As where a testator devised to *A.* for life, remainder to the future sons of *B.* successively, remainder over, and the testator provided for the disposition of the rents and profits during the minorities of those who were to take in future, *A.* died in the lifetime of the testator, it was decreed the contingent limitations should enure as executory devises, and that the profits from the death of the testator till the birth of a son of *B.* should go to the heir at law; and afterwards a son being born to *B.* upon the death of that son it was decreed, that the rents and profits should belong to the heir, until some other person should become intitled under the limitations in the will.

1 Vez. 485.
Rogers v.
Gibson.

Caf. Temp.
Tal. 228.
Stephens v.
Stephens.

But a devise of all the *rest and residue* of the real estate will pass as well the profits from the testator's death to the time of the estate's vesting, as from the determination of the first estate to the vesting of a subsequent. As where the testator devised all the rest and residue of his real and personal estate, of *what* nature or kind soever, to such child or children as his daughter should have, it was held, that the profits, from the testator's death to the birth of a child of his daughter should pass under that devise. So where a testator devised an estate to his grandson *B.* in fee, and if he should die before the age of twenty-one, then to such other grandson then unborn as should attain the age of twenty-one, remainder over to *C.* *B.* died under age, and it was decreed, by advice of the judges, that the intermediate profits between the death of *B.* and the vesting of the estate by virtue of any of the

the subsequent limitations passed to C. by force of the residuary devise as an interest in the real estate undisposed of.

So likewise in the case of an executory devise of a personal estate, the intermediate profits, either before the estate is to vest or between the determination of the first estate and the vesting of a subsequent limitation, will pass by virtue of a residuary devise. As where the testator devised all the rest and residue of the yearly rents of an estate (real and personal) devised in trust, over and above certain payments to be applied during the life of his son B. to the education of the future children of his said son, and after B.'s death, one moiety of the said trust-estate to the said children, and the other moiety to somebody else, it was decreed, that the profits, from the testator's death to the birth of a child of B. should go entirely to B.'s children.

But where there is no residuary devise, or other particular disposition of them, it seems the profits of a personal estate between the death of a testator and the vesting of an executory estate, or between the determination of the first limitation, and the vesting of a subsequent one, will accumulate for the benefit of the person next to take by virtue of the limitations. As where a testator devised a share in a brewery to an infant, provided that infant should attain the age of twenty-one years, but if he should die before that age, then to B. it was decreed, that the profits from the testator's death until the infant should attain the age of twenty-one, should belong to the infant on his attaining such age. The infant died before that age, and it was decreed, that the intermediate profits belonged to B. and not to the infant's administrator. So where a testator devised a personal

Caf. Temp.
Talb. 145.
Vide also
1 Vez. 485.

Barnardist.
Rep. in Chan.
74. Atkinson,
v. Turner.

3 P. W. 305.
Studholm v.
Hodgson.

sonal estate to *A.* an infant, and if *A.* should die before twenty-one, and his mother should have no other child, then to *B.*; *A.* died during his infancy, and it was decreed, that the rents and profits, from the death of *A.* till the contingency should happen, were to accumulate and be added to the capital, and if *A.*'s mother should have no other child, they should go to *B.*

Caf. Temp.
Talb. 145.
Chapman v.
Blisset.

It seems, that in cases where estates are devised in trust, there is no necessity for particular trustees to support contingent limitations, the general trustees having the legal freehold in them will be sufficient for the purpose, and consequently in such cases, it is not necessary that any contingent limitation should vest at the time the preceding limitation expires. As where the testator devised his estate, real and personal, to trustees and their heirs, executors and assigns upon trust, to pay an annuity to his son *B.* and after *B.*'s death, he devised one moiety thereof to such children as *B.* should leave and their heirs, and the other moiety to the future children of his grandson *C.* &c. the testator died, afterwards *B.* had children and died, and afterwards *C.* had issue, it was contended that the legal estate in the trustees was determined at *B.*'s death, and therefore the limitation to *C.*'s children, being a contingent remainder, because limited *per verba de presenti*, and not vesting upon the death of *B.* (because *C.* had then no children born), could never vest at all; but it was held, that notwithstanding the limitation was *per verba de presenti*, as *C.* was very young at that time, the testator must have intended a future devise; and therefore it might well take place as an executory devise; but if it were taken as a contingent remainder; as some of the trusts mentioned
in

in the will would not admit the estate in the trustees to be confined to the period of *B.*'s life, the estate continuing in them would support the limitation to *C.*'s children, though it could not vest at *B.*'s death, and therefore whether it were taken as a future limitation or a contingent remainder, it would be good either way. So where *A.* devised to the use of trustees, and their heirs in trust for *B.* for life, remainder to his first and other sons successively in tail, remainder to the future sons of *C.* successively for life, remainder over; *B.* died without issue in the testator's lifetime, the contingent limitations were taken as executory devises, because no child was then born to *C.* afterwards a child was born to *C.* and died, and a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations which could not vest at the death of such child were destroyed, as it had been decreed that upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders upon that executory devise; but it was held that the inheritance in the trustees was sufficient to support the intermediate contingent limitations till they should come *in esse*, although no particular trustees to support, &c. were inserted, and that the estate should not vest in possession, whilst an object of any preceding limitation might come *in esse*.

In cases of contingent or executory interests, the court of Chancery will interfere in behalf of the persons intitled to such interests, to prevent unreasonable waste being committed by the tenants in possession as appears in the case of *Dayrell and Champness*. The court has even gone

Caf. Temp.

Talbot 44.

Hopkins v.

Hopkins.

1 Vezey 268.

Hopkins v.

Hopkins.

1 Eq. Abr.

10400.

So far as to decree a restitution of the value to a contingent remainder-man, for waste committed before the contingency happened, by the tenant in possession in collusion with the person intitled to the inheritance in remainder. As where *A.* being

¹ *Vezev* 524, tenant for 99 years determinable on his life, without impeachment of waste *except voluntary*, remainder to trustees to support contingent uses, remainder to the first and other sons of *A.* successively in tail, remainder to *B.* in fee; *A.* having no son then born, agreed with *B.* to fell timber and divide the profits; a son was afterwards born, and Lord *Hardwicke* decreed that the son should recover against the representatives of *B.*

¹ *Vezev* 524,
546.
Garth v. Sir
John Hind
Cotton.

I shall here conclude this essay with two or three cases, which should properly have come in where I was treating of the destruction of contingent remainders.

I observed, that notwithstanding the particular estate might in some cases be revived, yet the remainder when once destroyed, would never arise. But where a contingent remainder was destroyed by a fine, and afterwards that fine was annulled by act of parliament, it was held that the contingent remainder was revived, though it would have been otherwise if the fine had been reversed for error.

³ *Keb* 37, 87.
Cole v. Le-
vingstone, and
Vid.
¹ *Lord Raym.*
314.

If there be tenant for life with a contingent remainder over, and tenant for life make a feoffment in fee upon condition, and the contingency happen before the condition broken, the remainder is destroyed notwithstanding the tenant for life afterwards enters for the breach of the dition, because there is no particular estate in being, or any right of entry when the condition happens

² *Salk.* 577.
Show. Parl.
Cal. 151.

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